United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a corporation, SALMON RIVER CANAL COMPANY, LIMITED, a corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, Trustee, and A. C. ROBINSON, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

BRIEF OF APPELLANT,
Twin Falls-Salmon River Land and Water Company

SAMUEL H. HAYS,
Solicitor for Appellant, Twin Falls-Salmon River Land and Water Company.

J. H. RICHARDS,
O. O. HAGA,
Solicitors for Appellants, Commonwealth Trust Co. and A. C. Robinson.

PASCO B. CARTER,
Solicitor for Appellant, Salmon River Canal Co.

C. O. LONGLEY,
Solicitor for Appelees.

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STATEMENT.

This suit grows out of the alleged insufficiency of the water supply on the Salmon River Irrigation Project in Southern Idaho. The project is known as a Carey Act Project.

This appeal is from an interlocutory decree in favor of appellees, who were the complainants in the court below, granting an injunction restraining the appellants, who were the defendants in the suit, from collecting any money due from settlers on the project, amounting to two millions of dollars and upwards, until a certain claimed water supply is furnished. The decree in effect is largely

final. The action was brought by settlers on the tract on behalf of themselves and others against the company building the works, the company operating the works and the security holders.

Conditions Giving Rise to the Suit.

The Acts of Congress known as the Carey Act (Sec. 4, Act of August 18, 1894, 28 Stat. 372; Act of June 11, 1896, under head of "Surveying Public Lands," 29 Stat. 413; Sec. 3, Act of March 3, 1901, 31 Stat. 1133), granted to each of the States in the arid region one million acres of land, provided the States would secure the reclamation of such tracts and authorized the States to fix a lien upon the land "for the actual cost and necessary expenses of reclamation and reasonable interest thereon;" in other words, to assess the benefits against the land which would accrue by reason of the making of the proposed improvements.

The State of Idaho, in pursuance of this act, provided by statute (Sec. 1615, R. C.) that proposals and requests might be made to the State Board of Land Commissioners for the building of such works for the irrigation of definite tracts of land to be described in the proposal, the work to be done under the supervision of the State and to the satisfaction of the State Engineer (Sec. 1623, R. C.). This statute may properly be considered as an advertisement for bids for the construction of such works.

The construction company desiring to build such works makes a proposal to build the works for the irrigation of a certain definite tract according to certain definite plans (Sec. 1615, R. C.). This proposal amounts to a bid for the doing of the work. At the time of making such proposal, the statute requires (Sec. 1617, R. C.) that the construction company,

> "shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described"

in the proposal. This is merely a convenient way of attaching the water supply to the project. The State Engineer is required by statute (Sec. 1618, R. C.) to determine and report,

> "whether there is sufficient unappropriated water in the source of supply, and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the works is adequate to reclaim the land described,"

and other similar requirements. This determination by the State Engineer is final, for, as provided by statute (Sec. 1619, R. C.),

> "no request on which the State Engineer has reported adversely as to the water supply, the feasibility of the construction, the cost or capacity of the works, or as to the character of the land sought to be irrigated shall be approved by the board."

The plan is one of complete State supervision and control.

The interest which the settler has in the enterprise is defined by statute (Sec. 1615, R. C.), it being required that the proposal shall state

> "the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a *proportionate interest in the canal or other irrigation works, together with all the rights and franchises* (water rights) *attached thereto.*"

This proportionate interest is a proportionate interest in the right represented by the water permit taken out

for the project. The settlers are to ultimately own the project.

After approval by the State Engineer and by the Land Board, the plans must be presented under the State and National laws to the Department of the Interior for approval (Sec. 1619, R. C.), after which the Government enters into a contract with the State for the patenting of the lands to the State (Sec. 4, 28 Stat. 372), and the State enters into a formal contract with the construction company to build the works in accordance with the plans before presented and approved (Sec. 1621, R. C.). Entries of these lands are made before the State Land Board. Persons entering these lands must present to the State a contract with the construction company showing that they have agreed to pay the amount of the lien fixed by the State against the land, and that they are entitled to a proportionate interest in the irrigation works and appurtenant water supply (Sec. 1626, R. C.).

The form of contract to be entered into between the settler and the construction company is approved by the State Land Board (p. 259).

The lands are then thrown open for settlement (Sec. 1625, R. C.). The State acts in the matter of making the contract and in the approval of a form of settler's contract, as well as in other matters, as the agent or trustee for the settlers who are in the future to inhabit the tract. The contract with the State for the construction of the works is made prior to any settlement and the form of contract to be entered into with the settlers is likewise determined prior to such time.

Before the making of any contract, the plans must be approved both by the State and the National authorities, and the sufficiency of the water supply determined.

It will thus be seen that the general plan is one providing that the cost of the reclamation of certain arid land shall be assessed as a benefit against the land to be paid by the settler thereon; that the benefit is assessed through the medium of the State Board of Land Commissioners and that the plan provides for State and National approval with supervision of work to be done by a private corporation, and for ultimate ownership of the works and appurtenant water supply by the settlers, each settler having a proportionate right therein, as provided by statute, and no settler having any priority over others, the sufficiency of the water supply having been predetermined.

In this case, a proposal was presented to the Land Board on the 12th day of August, 1907, by the predecessors in interest of the Twin Falls-Salmon River Land & Water Company.

On the 30th day of April, 1908, the State of Idaho entered into a contract with the Twin Falls-Salmon River Land & Water Company for the construction of the necessary irrigation works. This is commonly called the State Contract. This contract fixed the lien upon the land (pars. XIV, p. 58 and VIII, p. 51). Shortly thereafter, a form of contract with the settlers was agreed upon between the construction company and the State, and on the 1st day of June, 1908, the land was thrown open for settlement. Very shortly thereafter (within a month) over 70,000 acres of the land were contracted and entered by settlers (p. 14). The works were substantially completed in the spring of 1911 and consist (p. 191) of a concrete dam 230 feet in height, two tunnels over eleven feet square, having a total length of 3,500 feet, and many miles of distributing canals covering an area of approximately 100,000 acres.

Water was first turned onto the project in 1911 and has been used each year since, the land in cultivation during the various years being as follows (p. 137):

In 1912	16,310 acres
In 1913	23,043 acres
In 1914	30,064 acres

The following amounts of water were turned out of the reservoir into the canals of the company for use on the lands under the system in the following years, to-wit (pp. 199-200):

1911	22,843 acre feet
1912	62,827 acre feet
1913	73,000 acre feet
1914	103,000 acre feet

The State Engineer, whose duty it was under the statute to report upon the project at the time of the making of the proposal to the State, reported that the water supply was sufficient for the irrigation of 150,000 acres of land (p. 389), and a water permit of 1,500 second feet for the project was approved by him. The original promoters of the project proposed to build irrigation works for the irrigation of that area (p. 389), which was made up of 127,000 acres of Carey Act land, the balance being school land and desert entries which came under the project (p. 389, 43).

The measurements of the water supply taken in the spring of 1908 proving somewhat disappointing, and the Twin Falls-Salmon River Land & Water Company, commonly called the Construction Company, desiring to act along conservative lines, it was arranged with the State that the works to be constructed should cover only 100,000 acres, with the understanding that the area would be in-

creased to the original amount if the water supply was found to be sufficient.

Later on, it was further arranged with the State that only 80,000 acres of Carey Act land should be opened for entry on the opening day (p. 318) (Sec. 1625, R. C.). Shortly thereafter, contracts were made between the company and settlers on Carey Act desert and State lands covering approximately, all told, 73,348 acres (p. 218). These contracts for the most part were made on the opening day (June 1st, 1908) and probably all of them within a month from that date. This suit was brought on the 16th day of May, 1914.

At the time of the commencement of the suit a large number of Carey Act entries had become invalid by reason of the failure of the entrymen to settle upon the lands and make the cultivation required by the State statute (Sec. 1628, R. C.), so that the project, at the time of the hearing represented an area of 57,348 acres (p. 219) instead of 73,348 acres, as it did shortly after the opening, and instead of 150,000 acres as originally contemplated.

Measurements taken after the original report of the State Engineer show that since the inception of the project, the average annual available water supply has been 130,000 acre feet (p. 192), this being the supply available for the 57,348 acres above mentioned instead of 400,000 acre feet for 150,000 acres as originally reported by the State Engineer. Neither the pleadings nor the testimony contain any explanation of this condition. The water permit was for 1,500 second feet. This amount has been in the stream at times, during the high water season, but not for a long enough period, since the inception of the project, to give a total average yearly flow of more than 130,000 acre feet (pp. 192, 213, 178). It is common knowledge that

the flow of streams in some years is three or four times the amount in other years.

Pleadings and Issues.

This action was brought by certain settlers on the project on their own behalf and ostensibly on behalf of all others similarly situated (p. 36).

The defendant and appellant, the Twin Falls-Salmon River Land & Water Company, commonly called the Construction Company, is the company that built the works. To this company the settlers gave contracts commonly called settlers' contracts in payment for the interest in the works and appurtenant water supply which they were to acquire. These contracts also represented the lien which the State fixed upon the land under the authority of the Act of Congress and provided for the payment of this lien by the settlers in certain small installments covering a period of ten years (pp. 149, 67).

The defendant and appellant, the Commonwealth Trust Company of Pittsburgh, is the party to which the Construction Company assigned the settlers' contracts as collateral for the purpose of securing a bond issue.

The defendant and appellant, A. C. Robinson, is the assignee from the Construction Company of a considerable amount of settlers' contracts, the assignment being made to secure advances of funds.

The defendant and appellant, the Salmon River Canal Company, is the company which, under the contract with the State, will eventually take over the project. The rights of the settlers in the works are represented by shares of stock in this company. Until thirty-five per cent of the price is paid, the Construction Company votes this stock (pp. 11, 53). Except in a few rare instances, the thirty-

five per cent has not been paid (p. 24). This company, usually known as the Operating Company, is a nominal party only, having no financial interest in the suit.

The State Board of Land Commissioners of the State of Idaho was at one time a party to the suit, but a dismissal was afterwards entered.

The bill also alleges that the Twin Falls-Salmon River Land & Water Company, the company constructing the works, entered into a contract with the various settlers under the project whereby it agreed to deliver to them 2.75 acre feet of water per acre during every irrigation season, under a rotation system, or .01 of a second foot of water continuous flow from April 1st to November 1st of each year, amounting to 4.16 acre feet (pp. 16, 17), or that it agreed to deliver an "ample supply" (p. 18), that being the phrase used in the act of Congress (29 Stat. 413, under "Surveying Public Lands"). The bill was framed on the idea that the contract called for either one or the other of these constructions, or that the Carey Act itself provided the measure of the right, the pleader leaving it to the ingenuity of the Court to determine the matter.

The bill also alleged the making of contracts between the company and various settlers covering 75,000 acres of land (p. 14); that the company did not have available more than 50,000 acre feet of water (p. 17), and that the water supply was insufficient for more than 30,00 acres of land (p. 26).

In order to secure the interposition of equity and sustain the bill and show a substantial and not merely a nominal injury, it was further alleged that 2.75 acre feet of water for each irrigation season, or .01 of a second foot of water continuous flow from April 1st to November 1st

of each year, amounting to 4.16 acre feet, was actually necessary for the irrigation of crops and that the settlers could not get along with less (p. 17).

All of these allegations were denied (pp. 79, 85, 95) thereby raising the issue of the construction of the contract, the necessity and sufficiency of the water supply, and particularly as to whether or not any settler had been harmed by the alleged shortage of water, regardless of the construction given to the contract.

It is the contention of the Construction Company that it never made any contract calling for the delivery of any of the amounts of water specified in the bill. It is a construction company only. At the inception of the project, it was necessary under the law for the company to take out a permit for the appropriation of a water supply for the irrigation of the tract. It was necessary for the State Engineer to examine into and determine the sufficiency of this supply. This was done on behalf of the State, which was acting as the agent of the settlers. The water supply was determined to be sufficient and the works have been constructed. The interest of the settler in the water supply represented by the permit taken out for the tract, is as defined by statute (Sec. 1615, R. C.), a proportionate interest therein.

It is furthermore the contention of the Construction Company that the existing water supply is entirely sufficient for the irrigation of the project under its diminished area (57,348 acres), and it desired to show this fact conclusively. The Court, however, refused to hear any evidence whatever upon the question of the sufficiency of the present water supply for the irrigation of the present area of the project and this is one of our principal assignments of error.

The citizenship of the parties, the building of the irrigation works by the defendant company, the making by the settlers of contracts calling for the payment to the Construction Company by them of $40.00 per acre, of which amount $3.00 had been paid, leaving an average balance of $37.00, the making of a mortgage to secure an issue of bonds, the transfer of the settlers' contracts by the Construction Company to the trustee under the bond issue as collateral for the payment of the bonds, and the assignment of certain contracts to the defendant Robinson were all duly alleged.

For relief the bill asked (p. 37) that an injunction be issued restraining the defendants and appellants from collecting any money upon the contracts given by the settlers; that the amount due from the settlers be held to constitute a trust fund for the purpose of furnishing to each acre of land, providing it could be done, a water supply of 2.75 acre feet per acre, or .01 of a second foot per acre continuous flow from April 1st to November 1st of each year; that if such a water supply could not be found (as the Court found that it could not be in this case), that the area of lands under the project, which the works were built to irrigate and which were already covered by land entries and contracts with settlers, be reduced and cut down and that the contracts with the settlers outside of the reduced area be canceled, and that they be paid damages from the funds to be collected which were claimed to be a trust fund, and that the Court determine the priority of rights among the settlers on the project and that a receiver be appoined to carry out the plans proposed.

This suit was not brought upon the ground of fraud or bad faith, but merely upon the ground that the water supply in the past four years has turned out to be less abun-

dant than anticipated at the inception of the project.

The relief asked amounted to a taking apart and a complete making over of the project, the taking over and impounding of all moneys due or to become due from the settlers and the distribution among them of such funds by way of damages.

Under the plan proposed the project would be cut in half, the settlers on the part remaining would pay the amounts due less any damages to them, the remaining funds being paid by way of damages to those eliminated from the project. Nothing would remain for the investor. It was a plan for benevolent assimilation of the project by the settlers.

The appeal in this case is from an interlocutory decree (p. 393) which, while interlocutory in its terms, is in practical effect largely final. This decree construes the contracts between the parties and enjoins and restrains the defendants from collecting or attempting to collect any money whatever until such time as the settlers on the project have been provided with 2.75 acre feet of water per acre for each season, this amount to be measured at the points of delivery from the system into the consumer's lateral, or are given trustworthy assurance that said water will be provided.

The Court also found that the company was utilizing the entire water supply of the stream which was available and that no other source of supply existed (pp. 281, 305), so that the decree withheld all payments until a wholly impossible condition had been complied with.

So far as we may judge from the opinion and decree, it is the idea of the Court that those persons who, after entry, have failed to comply with the statute of the State (Sec. 1628, R. C.) with regard to the cultivation of their

lands (covering 16,000 acres) have made default and their contracts are practically abandoned and are subject to forfeiture (p. 306). Since the statute of the State has not been complied with, there can be no complaint upon our part to a cancellation of these entries, the settlers' contracts falling with them. This brings the project down to 57,348 acres (p. 219).

The Court speaks of the contracts made with these settlers as being "subject to rescission." Such is hardly the case, strictly speaking. The rights of the parties have been terminated by operation of the State statute. The company has nothing to do with it and has no right of "rescission."

The Court also says:

> "It (the company) should be required to exercise its right of rescission wherever it exists and by negotiation, it may reasonably be believed that it may further reduce the irrigable area."

In other words, the Court seems to think that the company may induce some of the settlers to give up their rights under the existing contracts. It would be entirely optional with the settler to do this. But the suggestion is diametrically opposed to the policy of the law, which gives to each settler an equality of right, or in other words, a proportionate interest in the works, and also to the terms of the State contract, which expressly provides that there shall be no priority between settlers (p. 49). If it were necessary to cut down the project, it could only be cut down by a proportionate reduction of the acreage of each settler. It could not be cut down by the elimination of a large body of settlers after the plan proposed in the bill and followed by the Court. The entire water supply cannot be taken and given to a few of the settlers to the exclusion of the re-

mainder. Such a course has no foundation either in the statute or the contract, and there is no occasion arising from the surrounding circumstances for the adoption of such a method.

The Court has apparently proceeded as if it might grant relief along the lines of specific performance and apparently requires that a few of the settlers shall be given a water supply of 2.75 acre feet and that the remainder shall be eliminated from the project; in other words, that there shall be a specific performance of the contract as to a portion of the settlers, the Court finding that specific performance as to all of them is impossible. The theory of the decree is wholly wrong. No definite plan for cutting down the project is shown in the bill. It does not appear who are to be eliminated from the project, although the claim is made that the project must be cut to 30,000 acres (p. 26) instead of 57,348 acres, as it now stands. Who is to suffer by the reduction of the area does not appear; nor is there any plan or design proposed in the bill for the making of the reduction.

It is claimed that this action is brought by the plaintiffs on behalf of themselves and all others similarly situated. This is indefinite. Those who are to remain on the project are situated in one way and those who are to be cut off are situated in another. It does not appear that any of the plaintiffs are among those who are to be eliminated from the project. The lower court frequently called the attention of the plaintiffs to this defect in the proceedings and the impossibility of granting relief without the presence of the parties affected. The direction of the lower court to bring in these parties was disregarded (p. 275). But the Court itself in rendering the decree ignored this feature of the case.

The place of measurement of the 2.75 acre feet of water is fixed by the Court at the point of delivery into the consumers' lateral. There is nothing in the contract to justify this and the theory of the contract and rule of the State courts is directly to the contrary. The place of measurement is a very important item in considering the area to be irrigated.

At the organization of the project the State Engineer reported that, "400,000 acre feet of water can be impounded annually" (pp. 389-390) for 150,000 acres of land or 2.66 acre feet per acre at the point of inflow into the reservoir. One hundred and thirty thousand acre feet at this rate would serve 48,750 acres. But if the supply is increased at the farmers' headgate to the rate of 2.75 acre feet, as decreed by the Court, then the 130,000 acre feet would serve an area problematically stated of 36,000 acres.

A motion to dismiss was made (p. 72) on the ground that the bill did not state facts sufficient to entitle the complainants to any relief, there being no equity stated therein, and also upon the ground that there was a failure to bring in the necessary parties to the suit.

The settlers' contracts are not negotiable instruments. They have been held to be subject to defenses. A settler having just ground may defend in case it is sought to foreclose the lien given by these contracts. In case of a partial failure of consideration, such, for instance, as the partial failure to deliver the water supply contracted for, there are legal rules settling the measure of damages. There are several hundred settlers on the project. Necessarily, if they interpose defenses, the Construction Company may have different answers to these defenses in different cases. Granting the relief asked for in this case would prevent

the Construction Company from interposing such answers to the claims made by settlers.

The relief asked was a cutting down of the acreage in the project and eliminating practically half of the settlers. Under the law this could not be done, because the interests of all settlers are proportionate and there is no priority of right among them; hence, any cutting down of the project must be done proportionately. For these reasons, the bill should not be sustained on the merits.

The parties who are to be eliminated from the project have one interest and the parties who are to remain in it have another. They are not similarly situated. It does not appear in which of the two classes the plaintiffs are, or whether there are sufficient parties before the Court to represent all interests. For this reason, the bill should have been dismissed on account of the non-joinder of necessary parties.

There was an allegation in the complaint (Par. XXIII, p. 24) charging bad management on the part of the company, but no evidence was introduced upon this point. There was also a charge that the method of delivery of the water was unsatisfactory (p. 30), but there was practically no evidence upon this point.

It was also charged that the company (Par. XVII, p. 21), had sold and delivered water to persons not entitled to it. It appeared that less than 1,000 acre feet had been loaned to a company on some adjoining lands during the season of 1914.

It was also claimed that the company had made erroneous representations (Par. XVI, p. 19) in regard to the available water supply. It was sought to show at the hearing (p. 147) that a certain circular had been issued by the company making certain representations in this respect.

It appears from this circular that it was issued by the Twin Falls North Side Investment Company, Limited (p. 155), and not by the Twin Falls-Salmon River Land & Water Company. The circular commences, however, with this statement (p. 147):

> "80,000 acres of Carey Act lands were opened for entry under the canal system on June 1st, 1908. 70,000 acres of this land were filed on during the month of June."

The circular does not bear date, but it was clearly issued after the 70,000 acres were filed on, and as the area of the project is now but 57,348 acres, (p. 218), this particular circular could not have induced the settlement of the lands. It was evidently a circular issued after entry of 70,000 acres and it devoted itself considerably to the sale of lots in the town of Hollister (p. 155). One of the plaintiffs (H. M. Sims) claimed to have seen this circular prior to the time he purchased his land from the original entryman (p. 156). No other person claims to have done this.

The representations as to the water supply (p. 152) were only substantial restatements of the matters contained in the report of the State Engineer (p. 388). The State and National laws relating to this matter are printed in the Appendix hereto.

SPECIFICATIONS OF ERROR.

1. We are a construction company building irrigation works in accordance with agreed plans covering a certain described acreage of land. We are to receive a definite amount per acre represented by an assessment of benefits, or a statutory lien, in payment for the work. We do not receive payment for "water rights."

The Court held in substance that we were not a construction company building works but were an irrigation company selling "water rights." (p. 286).

2. Our predecessors in interest took out a water permit in the State Engineer's office for the irrigation of the entire tract as provided by statute. This permit was granted and the sufficiency of the water supply for the entire tract approved by the State Engineer on behalf of the State acting as agent for the future settlers. The settler under the statute and contract has a proportionate interest in the water supply represented by the permit taken out for the project. Such water supply is to be delivered by the Construction Company under a rotation system as described in the contract (p. 55) :

> "In such quantities and at such times as the condition of the crops and weather may determine but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system."

The Company was to devise the plan of distribution in accordance with the following provision of the contract (p. 55) :

> "It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited."

The canals were designed to carry a certain head of water, to wit, .01 of a second foot of water per acre. This head was to be delivered under a rotation system or at certain intervals. There was no agreement that this de-

livery should equal 2.75 acre feet or any other specific amount, the interest of the settler being a proportionate interest in the entire supply belonging to the project, which supply had been previously determined to be sufficient.

The Court held that the contract called for a certain definite amount of water, to wit, 2.75 acre feet, instead of a proportionate interest in the common supply taken for the entire project.

3. The plans were approved by the State and the Department of the Interior, and a formal contract for the construction of the works was made. The State, in approving the water supply, making the contract and dealing with the project, acted as the agent for the settlers thereafter to occupy the lands. The question of water supply under these circumstances, the works having been built long prior to the commencement of the suit, was no longer open to controversy.

The Court held contrary to this, and in substance, that the question of water supply was still open for re-examination.

4. We contend, above all, that the water supply was sufficient for the irrigation of the reduced area of the project; that plaintiffs, even under the construction of the contract given by the Court, could have no relief unless they could show that they were harmed; that this matter of the necessity of the water supply demanded having been put in issue in the pleadings, it was incumbent on the Court to hear the testimony and determine the matter. The Court refused to do this and held that we must furnish to each settler 2.75 acre feet per acre whether it was needed or not, the Court saying (p. 302) :

> "If the right granted is too great and the settler attempts to use water wastefully, that is a matter of which the State and other appropriators upon the stream may complain. It is no concern of the defendants."

In other words, the Court held that the injunction should issue and the relief be granted regardless of whether appellees were injured or not.

5. The rights of the settlers under the statute and under the contract are proportionate and there is no priority between them. But the Court in effect provided that the project must be made over and the area cut down, and that this must be done by cutting off a large number of existing farms instead of cutting down the area of each farm proportionately, and that no payments need be made until the impossible conditions imposed had been complied with. Apparently the decree in effect is based on a specific performance for about one-half of the settlers on the tract, eliminating the others.

6. The place of measurement of the water supply was held by the Court to be at the place of diversion into the farmer's canal. The estimate of water supply made by the State Engineer originally was on the basis of the amount running into the reservoir. The place of measurement fixed by the Court has no foundation either in the contract or in the law.

7. The bill should have been dismissed—

(a) Because sufficient facts were not stated to sustain it; and

(b) Because the necessary parties were not before the Court.

(a) The interest of the settlers is proportionate. No settler has a priority over another. The bill sought to have substantially one-half of the project eliminated. No

such relief could be granted and the bill itself on its face, under the statute, showed that the interest of the settlers was proportionate and, therefore, that the relief asked could not be granted. Therefore, the bill should have been dismissed for the lack of any statement of facts to sustain it.

The question of water supply was determined in advance; otherwise, no contract between the State and the Construction Company would have been made under the law. The State, in determining this matter, acted not only upon its own behalf but on behalf of the future settlers. It appearing on the face of the bill that the water supply had been predetermined it was no longer open to controversy and the bill itself failed to state any facts justifying equitable relief.

In case of the foreclosure of the liens represented by the settlers' contracts, the settlers could present any defenses which they might have. In some cases, the holders of these contracts might have a sufficient answer to these defenses. Some of the settlers are original entrymen holding contracts direct from the company. All of the persons who testify in regard to the matter (pp. 189, 159, 167) appear to be persons who have purchased from the original entrymen. There are varying circumstances under which proper and sufficient answer might be made to these defenses by the settlers. The appellants, however, in such a case as this, are deprived of the right to make such just answer as they may have to the individual claims of settlers. The settlers, therefore, should be left to their defenses in any actions which may be brought against them. In this condition of affairs, the bill did not state facts sufficient to call for the equitable relief demanded.

(b) Substantially one-half of the settlers, under the theory of the bill, are to be eliminated from the project.

The other half are to remain. The parties whom it is proposed to eliminate from the project have a different interest from the parties who are to remain. Who are to be eliminated from the project and who are to remain does not appear from the bill, and no plan for determining the matter is set forth in the bill. Under the circumstances the parties are not similarly situated, and it does not appear that sufficient parties are before the Court to represent all interests. The objection on this ground should have been sustained and the bill, for the reasons given above, should have been dismissed.

8. We asked leave to introduce additional evidence, including a number of records showing the history of Carey Act contracts in Idaho in order to explain the contract (pp. 308-391). This matter consisted chiefly of public records bearing upon the subject. The decree being merely interlocutory, the additional evidence should have been considered if pertinent. On its face it appears to be pertinent, since it consists chiefly of well known public records, its truth must be admitted, at least so far as the documents are concerned and the conclusions necessarily drawn from them.

9. The court refused to follow the decision of the State Supreme Court construing Carey Act contracts.

ARGUMENT.

Generally speaking, the errors of the Court complained of belong to four general classes:

1. Errors relating to procedure:

(a) In excluding the testimony offered by appellants in regard to the duty of water. This testimony was directed to the question as to whether or not the plaintiffs had been harmed by the alleged deviation from the claimed

contract quantity of water. Appellants sought to show that the existing area could be successfully irrigated with the existing water supply and that appellees therefore had not been injured. This testimony was excluded (p. 395, Specifications 10,11).

(b) Refusing the application for leave to introduce additional testimony in explanation of the contract. This testimony in substance brought into the record documents that have been public records for many years and most of which the lower Court might take proper judicial notice of. This testimony was refused (pp. 308-391).

(c) Denying the motion to dismiss the bill (p. 395, Specifications 18, 19, 20, 21).

2. Error in the construction of the contract (p. 395, Specifications 1, 2, 7, 8, 9, 10, 13, 14, 15, 22, 23).

3. Errors relating to relief granted (p. 395, Specifications 3, 4, 5, 16, 17, 21).

4. Error in refusing to follow the decisions of the State Supreme Court and errors growing out of various subsidary questions.

Error in Refusing Testimony as to whether the Appellees have been Injured or not.

(a) The pleadings raised the issue as to whether or not the amounts of water claimed, to wit, 2.75 acre feet of water, or .01 of a second foot of water continuous flow, were *necessary* for the irrigation of the land; the statement appearing in Par. XIV (p. 17 of pleading) being as follows:

> "That in order for the settlers on said tract to comply with the provisions of said Carey Act and to irrigate and reclaim said land, or to raise ordinary agriculture crops thereon, at least one-half miner's inch per acre (.01 of a second foot) continuous flow throughout the entire irrigation season, or at least

> 2.75 acre feet of water per acre if delivered by periods of rotation as the needs of the crops demand, *is and will continue to be necessary,* * * * and that such amount of water above stated *is and will continue to be necessary* even though the most skillful, efficient and beneficial methods of use and conservation be used and any less amount will be wholly insufficient to raise ordinary agricultural crops."

A further statement with the same purpose is found in Paragraph XV (p. 18) of the bill.

The allegation of *necessity* was denied in the answer (par. 14, p. 79; par. 21, p. 85; par. 35, p. 95). It is very evident that the pleader considered it necessary to set up in the bill that the amount of water claimed, by reason of the contract, was necessary for the irrigation of the land in order to show that there was no remedy at law and that the plaintiffs and other settlers on the tract would suffer irreparable injury in case an injunction was not granted and a receiver appointed.

Taking the construction of the contract as claimed by the plaintiffs, still, if they had suffered no harm, an injunction would not issue; in other words, if the water supply was sufficient notwithstanding a deviation from the alleged contract, the remedy by injunction and the appointment of a receiver would not be available. So they sought to show that they were injured by the deviation from the contract and they therefore alleged that the amount of water claimed was absolutely necessary for the production of crops.

The rule is that to entitle plaintiffs to injunctive relief they must establish, as against defendants, an actual and substantial injury and not merely a technical or inconsequential wrong entitling them to nominal damages only.

16 Am. & Eng. Encyc. L. 360.

Joyce on Injunctions, Sec. 24.

Atchison v. Peterson, 20 Wall. 507.
North Fork Water Co. v. Medland, 187 Fed. 163.
San Joaquin, etc., Co. v. Fresno Flume Co. 158 Cal. 626.

The allegation that the water was necessary for the irrigation of the lands was therefore properly inserted in the bill if the plaintiffs desired the relief asked for.

The necessity of the water supply claimed being in issue, the refusal of the Court to hear any testimony in regard to the required supply was erroneous (pp. 225, 235-6-7, 265, 302). The plaintiffs introduced no testimony to show that they were injured by the alleged shortage of water supply.

When the defendants sought to introduce testimony to show that the existing supply was sufficient for the existing area of the project, the testimony was excluded. For the purpose of showing the amount of water that was necessary, it was proper to show the nature and character of the soil, the character of the crops to be raised, the manner of irrigation and the frequency with which water should be applied. It was to this latter question that the objection was made and sustained (p. 225).

The bill was peculiarly drawn and very uncertain. In the contract with the State there was a clause relating to the *size* of the reservoir (pp. 44, 48) and it was stated,

> "that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water which amount, in additional to the normal flow of said stream, during the irrigation period, has been determined to be sufficient to furnish 2.75 acre feet of water per acre for each acre of land to be irrigated."

This was the only statement in the contract relating to the water supply of 2.75 acre feet per acre, but it is set up in the bill (p. 17),

> "that at least 2.75 acre feet of water, if delivered by periods of rotation as the needs of the crops demand, is and will continue to be necessary."

In various parts of the State contract a *capacity* of .01 of a second foot of water is provided in the canals for each acre of land (pp. 48, 50, 54). With this in view, it was alleged in the bill (p. 17) that a water supply would be required of

> "at least one-half miner's inch per acre continuous flow throughout the entire irrigation season."

The term "one-half miner's inch" is not used in any of the contracts. It is equivalent to one-hundredth of a second foot and it is stated in the bill (p. 19),

> "that one-half miner's inch per acre continuous flow is equal to about 4.16 acre feet per acre"

for the season.

But in addition to this, and throughout the bill (pp. 17, 18, 23, 24), there are references to the Carey Act and the necessity of complying with the terms of said act and procuring the necessary water therefor. For instance, it is stated in paragraph XIV of the bill (p. 17)

> "that in order for the settlers on said tract to comply with the provisions of the said Carey Act and to irrigate and reclaim said land, or to raise ordinary agricultural crops thereon,"

that at least one-half miner's inch per acre continuous flow, or 2.75 acre feet per acre, if delivered by rotation,

is and will continue to be "necessary," and it is further stated in the same paragraph:

> "and any less amount will be wholly insufficient to raise ordinary agricultural crops and will not enable the complainants and settlers upon said tract to comply with said Carey Act regarding a permanent water supply to reclaim said land."

In paragraph XV of the bill (p. 18), it is stated:

> "that it was provided for and contemplated by the said State contract and the said settlers' contracts, that an ample supply of water was and would be provided and actually furnished through the said irrigation works * * * sufficient * * * to thoroughly and properly irrigate, reclaim and cultivate each acre of said land so as to comply with said Carey Act and the desert land laws of the United States and the laws of the State of Idaho."

This provision further states that it was contemplated that the amount to be furnished should be .01 of a second foot continuous flow, amounting to 4.16 acre feet in the season, or 2.75 acre feet if delivered by rotation.

The Carey Act is a desert land law. The first enactment (28 Stat. 372, Sec. 4) provided that the land should be reclaimed

> "as thoroughly as is required of citizens who may enter under said desert land law,"

and it was provided in the original act that as fast as the State should furnish proof that any of the lands

> "are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State, or to its assigns, for said land so reclaimed and settled."

In a later act (29 Stat. 413), it was provided that liens might be created by the State against the land for the actual cost and necessary expenses of reclamation,

> "and when an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to such State without regard to settlement or cultivation."

Taking these statutes into consideration, and the statements in the pleading, it is clear that the pleader in drawing the bill considered that it was necessary to show that the amount of water was not such a supply as was called for by the Carey Act, that is, that it was not sufficient to reclaim the land; and, in addition to this, the pleader sets up that the amount which is required to reclaim the land is either .01 of a second foot continuous flow, amounting to 4.16 acre feet, or else 2.75 acre feet delivered by rotation during the season.

If this view is taken of the pleading, then the question as to the sufficiency of the water supply, under the pleadings, is purely a question of fact, the question being as to what area the water supply will reclaim. Such being the case, the testimony in relation to the sufficiency of the supply should have been admitted.

The Court took the position,

> "if the right granted is too great and the settlers attempt to use water wastefully, that is a matter of which the State and other appropriators upon the stream may complain. It is no concern of the defendants."

The above decision of the lower court in this respect is directly opposed to the decisions of the Supreme Court of the State of Idaho in similar matters. That Court said, in the case of Niday vs. Barker, 16 Ida. 73 (79):

> "The theory of the law is that the public waters of the State shall be subjected to the highest and greatest duty. The fact that a water user and consumer

> has a rental right for a fixed number of inches of water does not of itsalf entitle him to that amount of water unless he can and will apply it to a beneficial use, and whenever he ceases to apply any part of it to such use, his right to have that amount turned out to him ceases for the time being and the extra quantity becomes at once available for another user and consumer."

In the case of Abbott v. Reedy, 9 Ida. 577 (581), the Court said:

> "It is true that he (the appellant) had been using about two inches per acre, but the law only allows the appropriator the amount *actually* necessary for the useful or beneficial purpose to which he applies it. The inquiry was, therefore, not what he had used but how much was actually necessary."

The appellants have no means of procuring the money invested in the project other than through the medium of payments made by farmers who successfully cultivate the soil. The money must come from the land. We have no desire, therefore, to impose upon the settlers a duty of water or method of irrigation which will not produce practical results. We desired to show just what amount of water was necessary for the reduced area of land and by what manner and method its irrigation could be successfully accomplished. The Court could not take judicial notice that the appellees had been injured or the extent of such injury. Proof must be introduced. Under the pleadings the testimony was admissible.

Refusing leave to Introduce Testimony Explaining the Contract.

(b) The Court said in the opinion (p. 303):

> "It is to be borne in mind that the evidence touching the duty of water was not offered for the purpose of illuminating the meaning of the writings.

> Possibly knowledge of what, at the time they were executed, was generally understood to be a reasonable amount of water for irrigation needs, might be of some assistance in determining the meaning of the parties attached to the phraseology employed."

We had thought at the hearing that the Court took a contrary view because it was stated (p. 262):

> "My present impression is that primarily this is a question of the construction of this contract and that this testimony (as to the duty of water) would not assist us in construing it."

We were of the view that the Court would render no decree construing the contract until further parties were before the Court (pp. 272-4). We believed the contract, upon its face, did not call for explanation. The matters set up in the affidavit (p. 308) were, most of them, referred to in the argument before the Court. They are chiefly historical and are well known to the local courts. In order that these matters might be made matters of record, they were inserted in the affidavit. There is very little in the affidavit outside of the reference to public records.

This was not an application to reopen the case in the ordinary sense for newly discovered evidence, but rather to bring before the Court the history of this form of contract as shown by well known public records and documents.

The report of the State Engineer upon the project in question had not been presented in evidence for the reason that the State Contract having been executed, the existence of a proper report by the State Engineer would be presumed.

It was, however, pertinent to show the conditions under which the State Engineer acted and this and all of the

other matters referred to in the affidavit should have been considered by the Court. The truth of the records referred to in the affidavit cannot be disputed. The Court evidently, however, decided the matter on its merits because it says (p. 392):

> "But it is doubtful whether the facts suggested, and none other, were admitted to be true, they could be given effect."

In the management of the case we may have been mistaken as to the proper method of conducting the suit, and as to whether or not it was necessary to introduce matter explanatory of the contract of the character proposed. One of the counsel in this case had much to do with the Carey Act contracts and did not desire to appear as a witness if such a course could be avoided. We felt that the Court would welcome any additional information which would throw light upon the contract. We did not think the Court would consider the matter from the mere standpoint of speed in the presentation of the matter; that is too narrow a view.

Where an interlocutory decree has been rendered, the case is still in the control of the Court and an error in such decree may and ought subsequently to be corrected whenever it is discovered.

Fourniquet v. Perkins, 16 How. 82.

Latta v. Kilbourn, 150 U. S. 524 (540).

Blythe v. Hinckley, 84 Fed. 288 (234).

Pittsburg C. & St. L. Ry. v. Baltimore & O. R. Co. 61 Fed. 705 (708).

N. K. Fairbanks Co. v. Winsor, 124 Fed. 200 (202).

The information therefore contained in the affidavit (pp. 308 to 391), if pertinent, should be considered. That

it was pertinent, will appear in a discussion of other points in the case.

Error in Denying Motion to Dismiss the Bill.

(c) This action is brought by eight plaintiffs, as stated in the bill, in their own behalf and on behalf of all persons similarly situated (Par. 10, p. 13; Par. 34, p. 36).

It was alleged that the water supply was insufficient for more than 30,000 acres of land (p. 26) and that we had an available water supply of not over 50,000 acre feet (p. 17). That it was necessary to make over the project and entirely eliminate a large number of the settlers. The present size of the project being 57,348 acres, the acreage to be cut off from the project as it now exists would be, according to the pleadings, 27,348 acres. Whether the plaintiffs or any of them were located upon the area to be cut off or not, or whether those persons who were to be eliminated from the project were represented does not appear. It is quite true that all of the settlers had the same kind of contract, but it is very evident from the relief sought that there were at least two interests, those who are to remain and those who are to be cut off from the project. They were not all similarly situated.

They have no common right which the bill seeks to enforce. Such right or interest is necessary.

Smith v. Swormstedt, 16 How. 288.

Therefore, the Court should have before it representatives of these various interests and the Court at one time so indicated (p. 275). The suggestion was not followed. There was therefore a fatal defect as to parties and the

bill should have been dismissed for this reason. It nowhere appears that the appellees fairly represent all of the interests in issue.

The motion to dismiss should also have been granted for another reason. No equity was stated in the bill.

The interest of the settlers under the statute is proportionate (Sec. 1615, R. C.). No settler has a priority over another. This is a result of the proportionate interest. It was also stated in the contract (p. 49). The bill sought to have substantially one-half of the project eliminated, but the bill did not sustain the relief asked or any part of it, for the reason that if any cut could be made in the project, it must be a proportionate one instead of an elimination of an integral part of the project.

No equity was stated also for the reason that the water supply was determined in advance and it is not now open to question. Having been approved by the State acting as the agent for the settlers prior to their settlement, and the settlers having later entered into contracts under these conditions, the question of water supply is not now open for consideration.

State v. Twin Falls Canal Co. 21 Ida. 410.
State v. Twin Falls Canal Co. 27 Ida. 728.

The above cases control and govern this case.

There were two principal things decided in advance of the construction of the project:

1st. That the water supply was sufficient; and

2nd. The amount of the lien to be fixed upon the land which was to be paid by the settlers.

If the question of the water supply is still open for consideration, then, likewise, the question of the amount of the lien would be open for consideration; but it has

been held that the amount of the lien, as settled in advance, cannot be changed.

In the case of the Idaho Irrigation Co. Ltd. v. Pew, 26 Ida. 272 (278), the Court said:

> "Before the state and the constructing company can enter into any contract for the reclamation of a tract of land, they must have agreed upon the estimated cost of construction and the corresponding price to be charged for water rights, in order to defray such cost. That agreement as to cost is the basis of the contract between the company and the state. Again, when the company first comes into relation with the settler, it must have contractual assurances from him that he will reimburse it for his share of this estimated cost, and the settler on the other hand must be safeguarded by a fixed contract price for the water right if he enters upon the land. This arrangement impresses us as not only unavoidable in the very nature of the conditions existing, but as eminently fair and just to all parties. If the prospective settler considers the estimated cost of construction excessive he need not contract for the purchase of water rights under that project. He is under no compulsion to contract with the company at all. He is not dependent on the company when he makes his contract with it, for the law does not permit him to enter the land before he makes the water right contract. If he does enter into a contract for the purchase of water rights to be paid for in installments, subject to foreclosure if the deferred payments are not made, it must be assumed that he does so with his eyes open, with the knowledge that the contract is one specifically authorized by statute, and at the same time receiving the assurance that he is protected by the provisions of the national Carey Act amendment, the effect of which is, that the lien cannot attach until the company has fully executed its part of the contract. (Childs v. Neitzel, supra.)
>
> "After the recitals of the settlers' contract with the company the first article of the agreement begins as follows: 'This agreement is made in accordance with the provisions of said contract between the

state of Idaho and the company, which, together with the laws of the state of Idaho, under which this agreement is made, shall be regarded as defining the rights of the respective parties.' In making that contract the settler assents to the estimate authorized by the state as to the cost of reclamation. Can he then be deemed to reserve any right to have another or later estimate made of the cost of constructing the works? We think not. He has contracted to make these payments with full knowledge of all these facts and circumstances, and in an action to foreclose the lien is estopped and precluded from questioning or denying that the price fixed by the contract represents the actual cost of reclamation and reasonable interest thereon, as contemplated by the Carey Act.

"Suppose, on the other hand, that the estimated cost is largely exceeded by the actual cost of construction, as is said to often be the case. Could it for a moment be maintained that the construction company would be entitled, under authority of the national act, to a lien sufficient to cover that increased 'actual cost,' in the face of the contract which it had made?"

The bill was insufficient also for the reason that, in case of foreclosure of the liens represented by the settlers' contract, the settlers could present such defenses as they had. In some cases, the company might have a sufficient answer to these defenses. All of the plaintiffs who testified upon the point are purchasers from others and not original settlers (pp. 185, 171, 189, 159, 167). The company might make different answers to the settlers' defenses as individual cases might require. They are prevented from doing so in this case. If in individual cases the defense was interposed that the settler had not received all that he was to pay for the rule would be that he might have a deduction made for the difference in value between the thing contracted and that received, but if the

water right actually received was sufficient for the purpose and no injury had been suffered, then only nominal damages could be recovered and the question would be one of fact. It was this rule and this condition that appellees desired to avoid (bottom p. 276-7).

In this case, there was no occasion for the intervention of equity as here claimed because the settlers could fully protect their interests in the cases brought to foreclose the liens. The authority of equity to prevent a multiplicity of suits does not extend to shutting out such defenses as we may have to settlers' claims.

Construction of the Contract.

In the construction of the contract we must consider the Carey Act, the State statute, the contract between the State and the Construction Company, and the contract between the Construction Company and the settler.

Some consideration of the purpose and history of the Carey Act is necessary. The plan of the Carey Act seems to have been brought about by reason of the difficulties which had arisen chiefly in Colorado and possibly in some adjoining States in the construction of irrigation works.

The individual ditch was doubtless the earliest form of irrigation development.

Next came the co-operative or mutual ditch built by a number of settlers for their common purpose. Their interests in these canals were sometimes represented by shares of stock and sometimes by deeds and occasionally by no writing whatever.

Kinney on Irrigation, Secs. 1459, 1479 to 1489.

Mead's Irrigation Institutions, pp. 48-59.

Chandler's Elements of Western Water Law, pp. 106-119.

After the cheaper developments were made, it became apparent that large capital was necessary, and during the period from 1880 to about 1890 many ditches were built throughout the west by corporations organized for that purpose.

Annual Report, Office of Experiment Stations, Department of Agriculture, 1910, p. 461.

The general plan of operation of these corporations was to provide a charge for a "water right" and, in addition, an annual charge. Instances of this form of contract may be found in the decisions of the courts.

Boise City Irr. Co. v. Clark, 131 Fed. 415.

Wheeler v. Northern Colorado Irri. Co. 17 Pac. 487.

Wilterding v. Green, 4 Ida. 473.

This method of operation, however, was done away with either by statutory or constitutional provisions, or by the decisions of the courts.

Mill's Irrigation Manual, p. 141.

Idaho State Constitution, Art. XV, Sec. 4.

This necessitated the adoption of other methods of development and plans were provided whereby corporations constructed the works and eventually turned them over to the settlers. Some were turned over to the settlers after a certain amount of stock was sold. These seemed to have occasioned little litigation. Others were turned over when the "estimated capacity of the canal" was sold. Much difficulty arose out of this arrangement.

Kinney on Irrigation, Sec. 1516-1519.

At that time, settlers generally acquired rights of priority under a canal by virtue of settlement and cultivation in the same manner as prior rights were acquired on a stream by virtue of appropriation.

Art. XV, Secs. 4 and 5, Idaho State Constiution, Secs. 3287, 3289, 3290 and 3291, Revised Codes.

Mellen v. Gt. Western Co. 21 Ida. 353.

These provisions related to companies "selling water" and not to mutual companies, or companies building works only.

The next form of development came under the Carey Act and the difficulties which had arisen greatly influenced the provisions of the act.

The remedy for the evils was outlined in the report of the State Engineer of Wyoming for the years 1893 and 1894, p. 29, as follows:

"What Should be Done."

"7th. The location of ditches ought to be in accordance with a prearranged plain. The plans of all large works ought to be subject to State supervision and State approval. The price of water rights ought to be fixed by prior contract with the State. They should be based on the cost of work, and, in justice to both settler and ditch builder, no arbitrary or extreme departure from this price should be permitted.

"8th. Land to be reclaimed ought to be reserved for actual settlers and users of water. Their opportunity to acquire title to such land should be conditioned on the securing of a water right for the land. This is a measure required for the protection of both ditch builder and actual home seeker.

"9th. No canal should be constructed which contemplates furnishing water for hire. Experience has

shown that such canals are prolific of controversies and that water is supplied at less cost to user when the farmers below a canal own and operate it. There is a further reason for this. In this State the water appropriated goes with the land; if the canal also goes with the land it obviates the creation of carrier rights as distinct from user rights.

"10th. Provisions similar to these have been incorporated in the water laws of the foremost irrigation States of the old world. As an enlightened, self-governing State we should not longer disregard the teaching of their experience."

The original Carey Act had been passed just prior to the making of this report and some attention is given to it on pages 29 and 30 of the report. In this report likewise much is said under the head of "Limitations of Rights to Water" (p. 32), and these statements show the prevailing view among State Engineers at that time.

In the report of the State Engineer of Wyoming for the years 1895-96, p. 20, there is an outline showing the advantages of the Carey Act and the Wyoming statute enacted in pursuance thereof from the investor's standpoint. There is also a statement of the advantages from the settler's point of view (p. 21). These advantages are stated as follows:

"1st. Cheap land. Fifty cents an acre; less than one-half the price paid under the desert land law.

"2nd. A State guarantee that there is water enough in the source of supply and that the canal has sufficient capacity to deliver it.

"3rd. A secure water right. Every owner of a home under this law has a title to both elements which make it productive. There is no controversy as to whether the canal builder owns the water and can charge what he pleases, or, as to whether the land owner is its possessor and can do with it as he pleases. The water rights acquired under this Act

belong to neither. They attach to the land reclaimed and are inseparable therefrom.

"4th. An ownership in the canal, a voice in its management, security from oppressive water right charges, and relief from the perpetual mortgage which goes with separate corporate ownership of canals."

The criticisms of the Carey Act then made appear on page 23. At this period of development, State supervision was a very popular movement and the plan whereby the sufficiency of the water supply and cost of the works should be decided in advance was expected to do away with all of the difficulties that had theretofore arisen. All settlers under the canal system were to have the same kind of water right and disputes between them were to be done away with. The supervision of the State was to be paramount. The decision as to the water supply and the price per acre were to be final and conclusive. The State was acting as the agent for the future settlers.

In speaking of the Carey Act, it is said in Mead's Irrigation Institutions (page 25):

"Irrigators own both the canal and the land, however, and know before entering upon the ownership what they are to pay for both and that there will be an ample supply of water."

The period from 1890 to 1900 was a period of considerable development under the irrigation district law and the taking over of works built by private corporations which had previously failed. The district law provided for the assessment of benefits against the land to be benefited.

The Carey Act followed the same plan. The State was authorized to assess the benefits against the land to be

reclaimed. The amount of this assessment was limited to,

> "the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

These provisions of course should receive a fairly liberal construction for the purpose of effectuating their object. The Land Board was required to determine in advace what assessment would be made and to fix the lien upon the land which the settler must pay.

The lien upon the land once fixed by the Land Board, the action as final.

Idaho Irr. Co. v. Pew. 26 Ida. 272.

Idaho Irr. Co. v. Lincoln Co. 152 Pac. 1058.

The terms of the grant were that,

> "the Secretary of the Interior * * * be and hereby is authorized and empowered upon proper application of the state to contract and agree from time to time with each of the states in which there may be situated desert lands * * * to donate, grant and patent to the state free of cost for survey or price such desert lands."

And by the first amendment of June 11th, 1896, the State was authorized to create a lien on the lands.

> "and when an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to such state without regard to settlement or cultivation."

It was claimed by the State of Wyoming that when the plan had been approved by the Department of the Interior and the contract made between the Government and the State, that this amounted to a grant in presenti.

The Attorney General of the State, in an opinion to the State Engineer, so held.

Report State Engineer of Wyoming, 1901-2, p. 52.

Wyoming was the home of the Carey Act idea. Dr. Elwood Mead, State Engineer of Wyoming, was probably the originator of the idea and Senator Carey, whose name the act commonly bears, was its earnest advocate.

Wyoming was the first State to accept the benefits of the act. Idaho followed shortly afterwards and copied the provisions of the Wyoming law.

The question does not necessarily arise in this case as to whether or not the approval of the plan by the Government is final and conclusive and whether the works being thereafter built, the patent must issue. It would be a hardship if such were not the case, and this has been recognized by the Department of the Interior.

In his annual report for the year 1911 (pp. 11-12) the Commissioner of the General Land Office, in speaking of these projects, says:

> "The importance of this (the examination of projects) cannot be over-stated for not only will the lands remain segregated for long period of time if the order therefor is once made, but in making such segregation, the Department is practically committed to the feasibility of the proposition submitted by the State and people thereafter dealing with the State are in a great degree entitled to regard the proposition of the State as having received the endorsement of the Department."

Leaving out the question as to whether or not the Government is finally bound by its acceptance of the plans or not, it is unquestionably true that the State is. The State enters into a formal contract for the building of the works, and this contract, following the provisions of

the National Law, is in effect a construction contract only.

Section 1615 of the Revised Codes relates to the proposal to construct the works and defines the interest of the settlers in the works which are to be built as a proportionate interest. The things that the contract between the State and the Construction Company shall contain are matters of statutory regulation.

Section 1621 of the Revised Codes provides that:

> "Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the board to enter into a contract with the parties submitting the proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers, and the price and terms upon which the State is to dispose of the lands to settlers. This contract shall not be entered into on the part of the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor for irrigation works, which bond shall be in a penal sum equal to five per cent of the estimated cost of the works, and shall be conditioned for the faithful performance of the provisions of the contract with the State."

The contract to be drawn under this statute is clearly a construction contract. The bond given is for the construction of the works.

Under Section 1622 of the Revised Codes, the forfeiture of the bond is to take place upon a failure to construct the works. The whole plan of the State statute is in conformity with the Act of Congress.

A water permit having been taken out for the benefit of the land on the project and the water supply represent-

ed by this permit having been determined in advance to be sufficient, the rights of the settlers having been defined by the statute as being a proportionate right in this water supply, it was not necessary that the statute should require anything further in the contract with the State than the construction of the works and the giving of the bond therefor, and it was upon this plan that the statute was drawn and the proceedings under it had.

That the contract is only a construction contract has been definitely settled by the State.

The rules and regulations of the State Board of Land Commissioners in relation to the Carey Act, adopted June 10th, 1905, page 6, states as follows:

> "The company entering into this contract with the state is related to the undertaking simply as a 'construction company, whose duty it will be, under the provisions of the state law and terms of the contract, to build a canal under the supervision of the state; the money spent in such construction being secured by the land which the canal is designed to irrigate. The works will be sold to the settlers who enter the land, at a price agreed upon with the state. Before the settler may enter the land, however, he must contract to purchase a share in such works for each and every acre of land which he desires to enter, each of the shares representing a certain carrying capacity in the canal system which in every case will be sufficient to deliver the water required for the irrigation of his land."

And the same provision is found in the rules and regulations of the Land Board adopted October 16th, 1909, page 6, and this construction has been followed by the Supreme Court of the State.

State ex. rel. West v. Twin Falls Canal Co. 21 Ida. 410 (see bottom of page 424).

Idaho Irrigation Co. v. Lincoln County, 152 Pac. 1058 (1061).

The lower Court said (p. 286):

> "The clear purport of the entire instrument is the sale of the water right and that is undoubtedly the sense in which the company expected it would be understood and in which it was understood by the settler."

The view of the lower court does not accord with the statements of the Land Board or the decisions of the Supreme Court, or the policy of the law under which the contract was drawn, or, as we will show later, with the contract itself.

The history of the act in Idaho and the contracts made under it further illustrate the view to be taken of the contract. This history is shown in the affidavit filed with the application to introduce further testimony (pp. 308, 391).

In 1899, about the time when the Carey Act idea began to gain headway in Idaho, the State Engineer and Attorney General of the State prepared a compilation of the irrigation laws and a set of regulations for the use of the State Land Board and the State Engineer's office in relation to the Carey Act and in connection therewith, prepared a form of contract to be made between the State and persons desiring to construct irrigation works under the terms of the Carey Act (p. 308). A copy of this form of contract is attached to the affidavit. It is found in the rules and regulations of the State Land Board of 1899, at page 100 to 107, and in the record herein at page 319 to 333.

In this form of contract, the interests of the settlers in the works were described as "shares or water rights" (p. 321) and the plan proposed was to convey by deed to each entryman of land

> "a water right or share in the said canal for each and every acre owned, filed upon or purchased from the State."

In one or two of the earlier contracts this method was used but it was found that it was necessary to provide the settlers with an organization in order to levy assessments and take proper care of the irrigation works, so that in subsequent contracts it was provided that a corporation should be organized for the purpose of operating the canal and that the water rights or shares in the canal should be represented by shares of stock in the company which was to own and operate the canal, commonly called the Operating Company. This idea was first incorporated in the contract between the State and the Twin Falls Land & Water Company (p. 348).

In the form of contract originally drawn, paragraph nine related to the water supply which the settler was to receive (p. 326), the relevant portion of this contract being as follows:

> "The said party of the second part shall, upon the sale of shares or water rights in said canal as hereinbefore provided, dedicate the said shares or water rights to the land owner, or entered by the same person or persons purchasing such shares, and the terms of said dedication shall provide that each and every acre of land owned or entered under the provisions of the act first mentioned in this contract, by the person or persons purchasing said shares, shall have a right to the use of at least ..... acre feet of water to be delivered from the said canal during each and every irrigating season, said amount to be measured at or within one-half mile from the place of intended use, in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn or by rotation, as will best

protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part, and that it shall meet the approval of the State Engineer."

The provision contained in the ninth paragraph of said contract was first found in the contract with the American Falls Company made in 1901 (p. 333); in that contract it being provided that two and one-half acre feet of water should be delivered to the settler during each irrigation season.

In the Mullins contract, made in 1902 (p. 335), it was provided that the settler should have the right to the use of at least three acre feet of water to be delivered from the said canal during the spring flow of the Malade River during each and every irrigation season, said amount to be measured at or within one-half mile from the place of intended use in such quantities and at such times as the user thereof may desire when the supply is plentiful, but during periods of scarcity it shall be delivered to the users in such heads and at such times as the condition of the soil, crops and weather may determine, etc. The flow of this stream was large during the early spring and much less later on; hence the provision that three acre feet might be applied early in the spring in order that the ground itself might be used as a reservoir so far as possible.

Report State Engineer 1899-1900 p. 75.

The next contract was with the Twin Falls Land and Water Company in 1903 (p. 337). It was in this contract that provision was first made for a corporation to operate the canal and for certificates of stock represent-

ing the interests of the settlers. The ninth paragraph of the contract was therefore changed accordingly. It reads as follows (p. 350):

> "The certificates of sale of water rights and the certificates of shares of stock of the Twin Falls Canal Company, Limited, shall each upon being issued to the purchaser or holder of land under the canal system, be made to indicate and define in the contract or certificate, as the case may be, the amount of water, to wit: One-eightieth of a second foot allotted to each acre represented thereby, and carrying capacity of the canal sufficient therefor, the water to be delivered from the canal during each and every irrigation season, said amount to be measured at or within one-half mile of the place of intended use in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part and used by it during the period while it retains the management of said system, and that it shall meet the approval of the State Engineer."

There is an additional distinguishing feature of this provision. *Before this time the contracts had provided for the delivery to the settler of a certain number of acre feet of water. In this contract that provision was eliminated.*

The next contract made was with the Twin Falls-North Side Land & Water Company (p. 380). The numbering of the paragraphs was changed and number nine appears in this as number ten, as it does in the contract in issue. The contract in issue follows in form the North Side contract above mentioned. These contracts show the history of this provision.

The contract involved in the case of State v. Twin Falls Canal Co. 21 Ida. 410, a governing case on the questions involved, is in this record (Ex. D. p. 337).

Prior to the making of this form of contract in 1899, water right appropriations had generally been looked upon as giving the appropriator a right to a continuous flow throughout the irrigation season or longer. Contracts and decrees were frequently looked at in the same light. Investigations just prior to this time had been extensively carried on by the Government in regard to the duty of water.

See Bulletin 86, Department of Agriculture.

Numerous reports from special agents throughout the west were made upon this subject.

See report of Irrigation Investigations in 1901.

There had been much criticism of contracts calling for a continuous flow. In Bulletin No. 86 (Use of Water in Irrigation, Report of Investigations in 1899), it was stated (p. 20):

> "Where decrees or contracts provide for the delivery of a continuous flow, it is pre-supposed that irrigators use water in this matter. This is not in accord with the best practice. Irrigators do not need water all the time. Few use if half the time. If they are required to pay for a continuous flow, they usually pay for something they do not get and always for what they do not need. The best practice provides for rotation on the part of irrigators in the use of water and the use of a larger volume of water for only a period of the time. Where this occurs, a different unit of measurement (from the inch or cubic foot per second) is desirable because it is not the continuous delivery of a stream of a designated size which is paid for but the total volume furnished during the whole or any part of the irrigation season.

> The growing recognition of the fact that a continuous flow of water does not correspond to the needs of irrigators has recently brought into use another unit of volume, the acre foot."

It was further stated (p. 21):

> "Contracts which provide for the delivery of a uniform constant flow are as a rule wasteful of water. They are not therefore to the interests of either ditch companies or the public."

In the rules and regulations of the State Engineer's office issued in 1899, page 119, the State Engineer of Idaho discussed the question of continuous flow. The State Engineer said in regard to this continuous flow (p. 120):

> "When practiced by a multitude of small users it leads directly to extravagant use and unnecessary loss of water * * *. Distribution by rotation is the system based upon the delivery to each user in turn or by rotation with other users from the same canal or main lateral such serviceable irrigating heads as his crops or soil might demand during the seasons of plentiful supply and a proportional part of the total available supply during seasons of scarcity; such proportion being based upon the priorities of the rights of users. This system for the distribution of water is as old as irrigation itself and it is only through its practice that the water supply of any arid region can be given its highest efficiency."

The whole matter of the distribution of water to irrigators is quite extensively discussed in this report (pp. 119 to 125), and the influence of the views of the State Engineer is found embodied in the ninth paragraph of the form of Carey Act State contract prepared by the State Engineer and the Attorney General jointly at that time (pp. 326, 308).

The State Engineer likewise discussed this matter in his biennial report for the years 1899 and 1900, p. 84.

When it came, however, to executing contracts calling for a definite number of acre feet of water, it was found that there was a lack of information upon this subject.

The State Engineer, in his biennial report for 1899 and 1900 (p. 86), says:

> "I am free to admit that notwithstanding the two years of study of this question in the Boise Valley, we know but little regarding the actual duty of water. To make observations which would enable one to safely estimate the duty of a given volume of water would require a careful study of the subject extending over years. The general results attained, as shown by the table, indicate, however, that it is possible to attain a very high duty in this valley. From the observations made, I think we may safely estimate that the average depth required for irrigation here will be from two to two and five-tenths acre feet."

As perviously noted, the American Falls contract called for two and one-half acre feet (p. 334) and the Mullins Canal & Reservoir Company for three acre feet (p. 335) under the special circumstances of that project.

Report State Engineer, 1899-1900, p. 75.

When the next contract was drawn, which was one calling for the irrigation of 240,000 acres of land, the provision, as before stated, was omitted. The reasons for the omission of this provision are stated in the affidavit (pp. 311, 312).

Under the Carey Act plan, a water permit for the entire project was to be taken out in exactly the same way as a water permit for a single farm. It was first necessary to determine whether this was sufficient. If it was sufficient, then the only question remaining was the method of distribution among the people using the sup-

ply. The rotation method was considered the most modern and up-to-date, the one which had been found necessary wherever irrigation was extensively practiced.

State v. Twin Falls Canal Co. 21 Ida. 410 (441).

If the water users, however, had the right to demand a certain flow of water, whether needed or not, it might greatly interfere with an effective system of rotation.

It might prevent the shifting of water from place to place, as the best interests of the tract required.

In some respects, the fixing of an amount to be given to a farmer measured in acre feet was as objectionable as the fixing of a continuous flow of an inch or a second foot to any given number of acres. It was expected that practice and experience would show just what could be done by the rotation system and that this plan should be devised by the company building the works which would employ capable engineers for that purpose. The water was to be delivered under rules and regulations which, of course, must be reasonable but only at such times as the condition of the crops required. It was thought that the highest duty of water and the best conservation of the waters of the State would result from this practice.

We think the reason for dropping this provision of the contract with regard to a definite number of acre feet reasonably appears from the fact itself without further explanation. All the contracts following the contract mentioned up to the time of the execution of the contract with the State here in question (p. 54) followed the same plan and omitted any reference to a definite number of acre feet of water to be delivered. It was under these circumstances that the contract in question was drawn.

There was another consideration also. The Reclamation

Act was passed in 1902, before the execution of the contract Exhibit "D" (p. 337) with the Twin Falls Land & Water Company in 1903 above mentioned, this being the contract which first omitted any reference to a definite number of acre feet.

Section 8 of the Reclamation Act provided:

> "That the right to the use of the water acquired under the provisions of this act shall be appurtenant to the lands irrigated and beneficial use shall be the basis, the measure and the limit of the right."

In the form of articles of incorporation for water users' associations on reclamation projects, Art. V, Sec. 6, Mill's Irrigation Manual (p. 301), it was provided:

> "The amount of water so to be delivered to such owner shall be that proportionate part of all stored and developed water, the storage or development of which is or may be affected by this association, or by means of works under its control, management or direction, or which may become available for distribution by this association from irrigation works built by the National Government during any irrigation season as the number of shares owned by him shall bear to the whole number of valid or subsisting shares of the association and then outstanding to be delivered to and upon said lands at such times during such season as he may direct."

The water right application for lands in private ownership (Form B) provides, in paragraph two thereof, as follows:

> "The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to the irrigable acreage of the water supply actually available as determined by the project manager or other proper officer of the United States."

The Department of the Interior issued a series of questions and answers relating to the Reclamation Act and its operation, of which the following questions and answers appear (p. 36):

> "Q. How much water will be furnished for the land?
>
> "A. Such amount as may be available from the works controlled by the United States not to exceed the amount necessary for the proper irrigation of the land. This quantity will be duly announced for each project when the Secretary of the Interior gives the public notice under Section 4 of the Act.
>
> "Q. What assurance has he of a sufficient supply?
>
> "A. The water users' association is required to limit the land represented by its shares to the area which the Government has determined can be cultivated to the highest efficiency."

Questions and answers will be found as follows in the pamphlet containing "Information Compiled by the United States Reclamation Service, January 1st, 1910, for the Payette-Boise Irrigation Project" (p. 11):

> "Q. How much water will be furnished for the land?
>
> "A. Such amount as may be available from the works controlled by the United States not to exceed the amount necessary for the proper irrigation of the land."

The plan of operation under the Carey Act is much the same as that adopted under the Reclamation Act. In one case, the question of water supply and the feasibility of the works is presented to the State and National authorities. In the other, to the National authorities. In both cases, the amount of the water supply to which a person is entitled is a proportionate part of the entire supply for the project.

A canal system on a project so large as this is made up

of many miles of canals of varying sizes. To present the detailed specifications of these canals would be an unnecessary labor. The thing to be considered is whether or not the canal will carry sufficient water and, therefore, it is most convenient to describe the canal as a canal having a size sufficient to carry a certain described amount of water.

Likewise with the reservoir. In order to determine its capacity, very extensive surveys are necessary and complicated computations. The specifications in regard to the dimensions of the reservoir are unnecessary provided it has a certain size; therefore, it is most convenient to describe a reservoir by the amount of water that it may hold.

There is another important matter in irrigation practice, and that is the "head" of water that is to be carried in the canal system.

State v. Twin Falls Canal Co. 21 Ida. 410 (437).

The size of the canals governs the "head" that can be delivered through them.

The water supply for the entire tract having been determined to be sufficient, the head of water to be carried having been provided for, the next thing is to determine the method of distribution, whether by continuous flow or by rotation. These matters are all provided for in the manner indicated in the contract in question (p. 42).

The size of the reservoir is provided, as follows (p. 44):

> "The reservoir formed by the dam will have a surface area of over 3,000 acres, an available capacity of 180,000 acre feet and will extend southward from the dam a distance of approximately twelve miles."

The contract also further states as follows (p. 48):

> "And it is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to

> provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of said stream during the irrigation period, *has been determined to be sufficient* to furnish 2.75 acre feet of water per acre for each acre of land to be irrigated."

This is a description of the size of the reservoir and a statement that a water supply with the aid of this dam had been predetermined to be sufficient to furnish 2.75 acre feet of water per acre. This is the only place in the contract where the amount of 2.75 acre feet of water per acre is mentioned.

The size of the tunnels and canals is likewise specified by their carrying capacity. The main canal was to have a capacity of 1,000 second feet, which was likewise the capacity of the tunnels (p. 45).

It was further stated (p. 48):

> "And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of .01 of a second foot per acre for each acre of land to be irrigated."

It was further provided (p. 50) that each of the shares should

> "represent a carrying capacity in said canal sufficient to deliver water at the rate of .01 of one cubic foot of water per acre per second of time * * *."

And it was also provided that (bottom of page 50):

> "said irrigation system, however, is to be built in accordance with the plans heretofore filed with the Board which system, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned."

It will thus be seen that the carrying capacity of the canals was predetermined; also that the capacity in re-

spect to the reservoir system had likewise been predetermined.

Paragraph ten of the contract (p. 54) provided as follows:

> "The certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests to be represented in said system, to wit, a water right of .01 of a cubic foot per second for each acre of land irrigated as provided in paragraphs IV and VIII of this contract, and a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein."

In the contract which was given to the settler, and which was signed by him, a copy of the stock certificate was incorporated (p. 64), and reads as follows:

> "..... Shares .....19....
>
> "This is to certify ..... is the owner of ..... shares of the capital stock of the Salmon River Canal Company, Limited.
>
> "This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land: ....., in accordance with the terms of the contract between the State of Idaho and the Twin Falls-Salmon River Land and Water Company and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls-Salmon River Land and Water Company, based upon the number of shares finally sold in accordance with the said contract between the said company and the State of Idaho."

In regard to this stock certificate, we say this—we are entirely willing that the owner thereof should receive .01 of a cubic foot of water per second of time for his land; that is a description of the head of water he is to receive. It is well settled that water for irrigation purposes is not needed all of the time.

Bulletin 86, Department of Agriculture, p. 20.
Report State Engineer, Idaho, 1899-1900, p. 84.
Hufford v. Dye, 162 Cal. 147.

How frequently shall he receive water?

The certificate was made in accordance with and in conformity with the contract between the State and the Company and refers to it. The contract between the State and the Company (p. 54) provides what the certificate shall contain, and furthermore provides in the same section that water shall be delivered,

> "in such quantities and at such times as the condition of the crops and weather may determine, but according to such rules and regulations based upon a system of distribution of the water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from the said canal system."

This provision of the contract answers that question.

But who is to devise the system of distribution?

That is also answered by the same section of the contract (p. 55), which says:

> "It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Ltd."

It goes without saying that the system must be a reasonable one and we may add here that we have no desire to establish any other. Our only security for our money is the lien upon the land to be reclaimed. If it is not successfully reclaimed, our security will be worthless. Unreasonable regulations or an impracticable plan would be of no value to us. It was expected that the plan would

be devised by able engineers as the result of actual experience and practice on the tract

The next question that may be asked is:

What is the total amount of water to be delivered?

The answer is that the statute provided that the interest of the settlers should be proportionate in the common supply; that a water permit of 1,500 second feet for the irrigation of 150,000 acres, or one second foot for every 100 acres, was taken out for the project; that it was predetermined that this amount was sufficient, that this amount existed, and that the settler's interest as defined by the statute and the contract was a proporionate interest therein. It was never intended that a continuous flow method should be adopted.

It is our contention that we are prepared to deliver a head of water of .01 of a second foot and there is no dispute on that point, the size of the ditches being sufficient.

It is also our contention that we are able to deliver this frequently enough, under the regulations that we are authorized to make, to produce satisfactory, practical, agricultural results upon the reduced acreage of the project.

It may be noted that the contract provided that the rotation system should only be used

> "in case the necessity arises during the period while it (the Construction Company) retains the management of the Salmon River Canal Company, Limited, (the Operating Company)."

This provision was inserted in order that it might not be obligatory upon the Construction Company to devise the rotation system and put it in use unless the conditions required it, as such a system would call for additional ditch-riders, more care in the measurements of the supply and greater expense.

It was unnecessary also for the contract to provide that the rotation system must be used in perpetuity. It was considered sufficient if this system was established and put in use in the early stages of the project. The settlers, of course, after taking over the project, would be entitled to operate it as they pleased.

We contend that under the provisions of the contract we are only obliged to deliver such an amount of water as may be necessary according to the condition of the crops, and that for this reason, as well as those heretofore urged, the question as to the sufficiency of the water supply which was put in issue by the pleadings must be one of the matters necessarily determined by the Court.

There was another feature of the contract. It was not drawn without what were supposed to be safeguards to the settler. Fifteen hundred second feet of water was appropriated for 150,000 acres of land (p. 47), or, in other words, an allotment of one second foot for every 100 acres. One share of stock in the operating company was to be issued for each acre of land (p. 53) or a total of 150,000 shares.

Considering, however, that it might be possible that the canals would not be built to their full capacity, it was provided:

> "In no case shall water rights or shares be dedicated to any lands before mentioned, or sold beyond the *carrying capacity* of the canal."

It was also stated in the contract that the carrying capacity specified in the contract had been determined to be sufficient (bottom page 50). A permit for 1,500 second feet having been taken out and the supply having been found to be sufficient, it was further provided in the contract that there should be no sales in excess of the amount

represented by the permit, the provision being as follows (p. 52):

> "In no case shall water rights or shares be dedicated to any lands before mentioned or sold * * * in excess of the appropriation of the water therefor."

The words "appropriation of water" in this clause refer to the appropriation represented by the permit taken out for the project (p. 47).

At the time of the making of these contracts no question as to water supply arose. That had been examined into and settled. The contracts with the settlers were practically all made in the month of June, 1908, before the record of the water supply of subsequent years had been gathered. This was not a provision limiting sales to the amount of water thereafter found to exist, because the State Engineer had just reported that the supply was sufficient.

Let us consider now the views of the contract taken by the Court:

The Court construes the contract to promise to the settler unequivocally a certain definite amount of water and then proceeds to find that amount is 2.75 acre feet per acre.

Let us see how the Court arrives at the conclusion that there is a promise in this contract to deliver a certain specific amount of water rather than a proportionate interest in the entire water supply, which had been predetermined to be sufficient.

In the first place, the Court says that it was highly improbable that the settlers would have signed a contract to pay $40.00 an acre for the mere chance of sharing with an indefinite number of others in a projected irrigation system, and the Court further says:

> "Can it for a moment be supposed that even the most susceptible could be induced to sign contracts if they were informed that the company would give * * * no assurance of any specific quantity, no undertaking that any given amount would be available for the project as a whole and no guaranteed limit upon the number of acres for which water rights would be sold?"

In answering this, let us take the situation as it was. At the time the water supply had been examined into and approved by the State Engineer, the plan had been approved by the Department of the Interior and the contract with the State was made on the 30th day of April, 1908. The contracts in question were made in the month of June, 1908. There was then no subsequent experience to show that the water supply was in any respect insufficient. There was no occasion for the Company to make any representations about the matter because the State, in the exercise of its authority, had determined the question, and, furthermore, the Company made no such representations.

The plaintiffs introduced their Exhibit No. 17 (p. 147), purporting to be the Company's advertisement in regard to these lands, and while it appears upon its face (p. 147) that it was not issued until after 70,000 acres were filed upon in the month of June, 1908, and while, as a matter of fact, it was the advertisement of a gentleman who was pushing a town which was named after him (p. 155) and was not really the advertisement of the Company, still, we may take this as it is in the record as an illustration of the point and it will be found that the inducing clause (p. 148) of the settlement of these lands was that the

> "State Land Board supervises the entire construction of the irrigation system and dams. The Land Board advises and looks after the interests of the settlers."

And the claim as to the water supply (p. 152) was no more extravagant than the statement of the State Engineer in his report upon the project (p. 389).

It was State supervision and approval that induced the people to enter these lands. The situation was the same as on reclamation projects. There was no occasion for the Company to make any promises, and, contrary to the view taken by the Court, there was a guaranteed limit upon the number of acres for which water rights would be sold.

As previously stated, a water permit was taken out for 150,000 acres. This was the original limit, which was afterwards reduced as heretofore stated.

The Court, in its opinion, called attention to the representation (p. 283), but, as previously stated, these representations were little less than the repetition of the report of the State Enginer.

Next, the Court goes to the consideration of the contracts and particularly calls attention to the so-called settlers' contracts (Exhibit C, p. 62). The Court says that

> "a printed form was prepared by the Company and offered to the public" (p. 284).

And further on, invokes the rule that

> "a printed form of agreement will be construed most strongly against the party by whom it is prepared" (p. 290).

There is no testimony in the record to sustain this. No doubt the original draft of this contract was prepared by the Company, but the contract as it stands was the form of contract that was approved by the State. This was well understood by both sides and the opposing counsel stated

> "the settler's contract was submitted to the State authorities and was there passed upon" (p. 259).

There was a reason for this. The State statute provided that land entries could not be made on this tract unless a copy of this contract was presented with the entry (Sec. 1626, R. C.). The rule invoked by the Court, therefore, in regard to the use of a printed form was without foundation.

The Court next considers the terms of the stock certificate which appeared in the printed form of settler's contract (p. 284) and concludes (p. 286) that the import of the instrument standing alone, as it would be understood by an intelligent layman, is not open to debate.

> "It is a contract for the sale of a specific water right of .01 of a second foot per acre for each acre of land described and as an incident thereto, a proportionate interest in the irrigation system."

The Court further says:

> "the clear purport of the entire instrument is the sale of the water right and that is undoubtedly the sense in which the company expected it would be understood and in which it was understood by the settler."

The Court further says that this

> "would impart a right in the owner at any time he had need and so long as he had need to divert and use a stream of the magnitude thus described. The question of the quantity of water in cubical measure would rarely arise for no one would be interested in calling it up."

We may well admit that it would impart a right in the owner at any time he had need "*and so long as he had need*" to divert and use a stream of the magnitude described. That is exactly the point—who was to decide the question as to how long he needed it? We answer that under the terms of the contract that this question of the rotation system and its plan of operation was to be de-

cided by the Company in the first instance, with the understanding, of course, that the plan of rotation must be reasonable (p. 55). With this understanding, the description of .01 of a second foot per acre is the description merely of the head of water that will be used when such use takes place. The question of the quantity of water in cubical measure is of vital interest to the project and the company conducting it. The difference between the careful and economical management of the water supply and the old-time careless method of continuous flow means a difference of many thousands of acres. Furthermore, in construing this provision in the stock certificate, it must be remembered that 150,000 acres of land were to be watered with 1,500 second feet of water, or, in other words, that there was an allotment of one second foot of water for every 100 acres of land, and this, upon the face of the papers, was the proportionate interest of the settlers in the project. This supply, however, not to be delivered continuously but as needed. It was known, of course, that this supply did not always exist in the stream. The State Engineer thought that the normal supply would be sufficient up to about the month of July (p. 390) and for this reason the building of the reservoir was necessary.

The amount of the water supply to be furnished to each settler was not contractual—it was statutory. As before stated, the permit to appropriate water must be taken out for the project. The sufficiency of the supply represented by this permit must be passed upon by the State Engineer (Sec. 1618, R. C.). If he disapproves, the project must be dropped (Sec. 1619, R. C.). If not, it is then up for approval by the Land Board. The permit is taken out for the irrigation of a definite area of land and not, as might be implied from the decision of the Court, for an indefinite area, and by statute, the interest of the settler

in this water supply is a proportionate interest (Sec. 1615, R. C.), the statute providing

> "said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto."

These "rights and franchises" are the water rights.

State v. Twin Falls Canal Co. 21 Ida. 410 (423).

Land opening and the making of contracts follow immediately after the making of the State contract. In this case, only a month apart, and the contracts were made in the light of the then existing circumstances instead of the conditions and circumstances which surround the project today.

After arriving at the conclusion that the contracts called for a certain definite amount of water, the Court then proceeds to discuss the question as to what this amount is and holds that:

> "A right was contemplated sufficient to enable the settler to receive water at the rate of .01 of a second foot per acre continuously during the season of actual irrigation needs, the amount of which the parties estimated and understood to be 2.75 acre feet and this view I am inclined to adopt."

We thought that we were entitled to deliver the .01 of a second foot per acre under the rotation system as provided in the State contract, but the Court here holds that we are to deliver water

> "at the rate of .01 of a second foot per acre *continuously* during the season of actual irrigation needs."

There is nothing in the contract whatever to justify the word "continuously." It is in flat contradiction of the express terms of the contract providing for a rotation system.

The Court then goes on to find that the amount is 2.75 acre feet.

The only place in any of the contracts where that amount is referred to is in the State contract (p. 48), where the language used is as follows:

> "It is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water which amount, in addition to the normal flow of said stream during the irrigation period *has been determined to be sufficient* to furnish 2.75 acre feet of water per acre for each acre of land to be irrigated."

Two and three-fourths acre feet for 150,000 acres would call for a total flow of 412,500 acre feet. The State Engineer estimated that

> "over 400,000 acre feet of water can be impounded annually for use on the 150,000 acres of land" (p. 390).

Four hundred thousand acre feet for 150,000 acres of land would be 2.66 acre feet for each acre, but it must be remembered in each of these instances that the State Engineer is speaking of the run-off of the stream, or, in other words, the amount to be measured into the reservoir.

In making water appropriations in Idaho, the point of measurement is at the point of diversion from the common supply, the user to stand the transportation losses.

Bennett v. Nourse, 22 Ida. 249 (254).

In this case the entire river is taken in at the head of the reservoir. On an ordinary project, the place of measurement would be the point of diversion from the stream.

State v. Twin Falls Canal Co. 21 Ida. 410.

Here it should be at the head of the reservoir.

The amount which the project was entitled to use from the stream was fixed by the permit taken out for the project (p. 47) at 1,500 second feet. In order that the farmers might secure their proportionate parts of this water, it was necessary to have a place of measurement in order to determine their rights among themselves, and for this purpose it was provided (top page 55):

> "Water shall be measured to users from the place of diversion at the main laterals of such irrigation system."

There was a definition in the contract of a main lateral (p. 57). The Court in the decree provides that the company contracted to provide water,

> "at the rate of 2.75 acre feet per acre *measured at the point of delivery from the system in the consumers' laterals.*"

This is not by many miles the point specified in the contract where the proportionate share of the settlers shall be measured to him. It may be here stated in explanation that under the place of measurement in the contract, it was expected that the settlers would organize among themselves for the delivery of water on laterals. It was thought at the time that this would be the most satisfactory method and would save the settlers something in the way of operating expenses; hence, the plan of measurement of the water supply on a lateral system in gross instead of to the individual settler as called for by the decree of the Court.

One of the main points that seems to be urged by the lower court in the construction of the contract adopted was that it was agreed that the Company might sell shares

> "to the extent of the capacity of the irrigation works *and to the extent of the rights to which it is entitled*" (p. 289).

This clause must be understood in the light of the conditions that surrounded the parties at the time it was made. The State Enginer had a short time previously investigated the matter and held that the water supply was sufficient. The Government had approved the plan and the contract had been made with the State. Within sixty days thereafter the contracts in question with the settlers were made. This contract was not made with the idea that the water supply was going to prove insufficient. It had just been approved as entirely satisfactory; therefore, this clause must be now taken to mean exactly what it meant at the time, that shares would not be sold beyond the capacity of the works which had been agreed to be built and that shares would not be sold beyond the limits of the water appropriation of 1,500 second feet, which had just been taken out and approved and which represented the right to which the project was entitled. These parties entered into these contracts with the idea that all question of the failure of the water supply had been eliminated, and, therefore, it was only necessary to provide the safeguards heretofore mentioned.

In commenting upon the water supply to be furnished under this contract, the Court further says:

> "Probably never before in Southern Idaho, save in some exceptional case, had water been given so high a duty as .01 of a second foot to the acre. In the early history of the state at least one-fiftieth of a second foot was generally regarded as being necessary and in more recent years, upon the more expensive projects, the duty was more or less frequently increased to one-eightieth of a second foot."

It is quite true that in the early history of the State an inch to the acre, or one-fiftieth of a second foot, was a common standard. The Carey Act has been in operation in Idaho, however, for nearly fifteen years and many con-

tracts have been made. There may be one or two instances in the early Carey Act contracts where a ditch capacity of one-seventieth of a second foot was provided for, but the first contract of importance made, to wit, the American Falls contract, called for a delivery of only two and one-half acre feet of water (p. 334).

The Twin Falls contract, made January 2nd, 1903, called for a ditch capacity of one-eightieth of a second foot, the water to be delivered under a rotation system (p. 350), and no Carey Act contract made since 1902 has provided for a larger quantity of water. On the contrary, there has been a constant reduction.

The Payette-Boise Reclamation Project, the largest in the State and where there is greater need of water than on the project in question, was many years ago based on a duty of two and one-half acre feet.

The contract on the Third Segregation of the Twin Falls North Side Land and Water Company is in substantially the same terms as the contract here in question. It was made in January, 1909, and the succeeding contract upon the Oakley Project, situated only twenty-five or thirty miles to the east (see defendant's Exhibit 19, p. 68, Vol. 2, tr.) called for a maximum duty of one and one-half acre feet, and it appears in the record that the conditions surrounding that project are the same as surround this (Vol. II, p. 23).

When the Court says

> "that the duty was more or less frequently increased to one-eightieth of a second foot,"

an erroneous impression is conveyed. The day of the inch to the acre passed many years ago. Conditions differ in different parts of Idaho. In eastern Idaho there are large streams and an abundant use of water and little

care used in irrigation. In southern and southwestern Idaho a much different condition prevails.

The conditions which the Judge of the lower court describes and which might apply to a district in eastern Idaho, have no general application to irrigation conditions in the State. Furthermore, it is a confusion of terms to say that a duty of .01 of a second foot to the acre is necessarily a high duty. It depends upon the manner of delivery and the total amount delivered. When the rotation system was first devised it was deemed necessary to have a large head of water in order to get over the land quickly and efficiently. It was recognized that a large head was a vital item in irrigation practice. It was also recognized that water need not be used all the time; hence the desirability of having one settler use water while the other was not doing so in order that the entire supply might be fully utilized. Later irrigation methods, however, largely did away with the necessity for a large head. The corrugation method in common use in the Twin Falls District does not require an abnormally large head of water.

Widtsoe's Principles of Irrigation Practice, p. 207 (211).

For this reason, the head of water has been cut down from what was formerly deemed necessary. The total amount of water, however, applied to the land depends in part only upon the head of water furnished, the important feature being as to the length of time the head is delivered. Even in the days of an inch to the acre, this head of water was not as a usual thing constantly delivered and the real amount of water put onto the land was practically never measured.

The Relief Granted.

The original estimate of the State Engineer was to the effect that there was 400,000 acre feet of water for the reclamation of 150,000 acres of land; or in other words, that there were 2.66 acre feet per acre, but this was not the amount that would be delivered at the farm. The report said:

> "400,000 acre feet of water can be impounded annually."

This would be the amount running into the reservoir. According to the measurements made by the Company the average annual flow is slightly in excess of 130,000 acre feet (p. 192). Some measurements made by the Geological Survey show 127,000 acre feet (p. 178). The difference is explained by the witness Newell (pp. 213, 205) on the ground that the Geological Survey's measurements were taken from a much smaller number of measurements than the Company's records. If the ratio of 2.66 acre feet is to be maintained, then the project would be cut to 48,750 acres. If the unit of 2.75 acre feet is to be taken, then the project would be cut to 47,270 acres, but if, as claimed in the bill and as decreed by the Court, the 2.75 acre feet are not to be measured at the intake into the reservoir nor at the point of diversion into the canal therefrom, nor at the point of diversion from the main laterals as mentioned in the contract (p. 55), but are to be measured at the farmer's headgate, then the losses by seepage and evaporation in the canal and reservoir must be deducted. These losses in the beginning are considerable, as they are on all new irrigation systems. The losses on this system are shown by the diagrams in evidence (pp. 195, 197). The loss in the canal system is likewise shown in detail (p. 201). It is not claimed that these are more than

the normal or usual losses in new works which, however, constantly grow less as the records show. What acreage can be covered with the water supply of 130,000 acre feet impounded in the reservoir by measuring it out in quantities of 2.75 acre feet at the farmer's headgate is problematical and this is recognized by the Court in the opinion and the decree. It is well recognized that the amount of land that can be irrigated from a given water supply on any project tends constantly to increase.

It is stated in the report of the State Engineer of Wyoming for 1895-96, p. 42:

> "The same volume of water will suffice to irrigate two or three times as much land after it has been cultivated a few years. It must also be borne in mind that this maximum volume is needed during only a limited portion of the year, not in any case to exceed two months, and in a great majority of cases, it will not exceed thirty days. This increasing duty of water is not the result of care and economy on the part of the irrigator but is the inevitable and uniform working of natural forces. * * * The significance of the increased duty of water which comes with its continued use is too important to be disregarded. The generally accepted mean duty of water in Colorado in the beginning of irrigation was one cubic foot per second for each 54 acres land. It now varies from two to six times this area. If, therefore, we are to say that an appropriator is entitled to a definite volume of water and to the continuous flow of that volume and disregard the greater service which this will render as irrigation becomes better understood and the subsoil saturated, we are conferring on every early appropriation an expanding right and inflicting a corresponding loss on the public."

The Court has not yet found the acreage that can be covered and has left the matter open for further testimony on the point of canal and reservoir losses.

We may gain an idea of the view of the duty of water taken by the plaintiffs from the pleadings. It is set up

that the project must be cut to 30,000 acres (p. 20), and it is also alleged that we have not more than 50,000 acre feet of water available for delivery to the farmer at his headgate (p. 17); in other words, a duty of 1.66 acre feet is indicated.

If this unit is used and an allowance of 30,000 acre feet made for losses in the entire system, then the 100,000 acre feet remaining would serve 60,000 acres, a larger area than the project as it stands at present.

At the hearing we sought to show that upon an adjoining project, known as the Oakley Project, twenty-five or thirty miles to the east, that the contract with the State provided for a maximum duty of 1.50 acre feet; that this contract was made very shortly after the making of the contract in question and that the project was in successful operation. For this purpose we brought evidence to show that the conditions on the two tracts were similar (Vol. 2, p. 23), the amount of water that had been delivered to settlers (Vol. 2, pp. 19 to 23) and to show the crops raised by these settlers (Vol. 2, pp. 7, 18). We thought that practical results on the adjoining projects would have an important bearing upon the question before the Court.

Our claim was that 1.50 acre feet of water during the irrigation season, the maximum amount provided upon the adjoining project, was sufficient for this project. The pleadings claim 1.66 acre feet, while the judgment of the Court gives 2.75 acre feet per acre.

If we allow 15,000 acre feet for loss in the reservoir and 15,000 acre feet for loss in the canal system, we would then have 100,000 acre feet for delivery, and on the basis of 2.75 acre feet at the farmer's headgate, this would serve 36,330 acres.

It is the invariable rule in the State of Idaho that water

appropriations are to be measured from the place of diversion from the common supply.

State v. Twin Falls Canal Co. 21 Ida. 410.

If we apply that rule to this case, the place of measurement would be the intake of the reservoir, that being the place where we began the use of the water and deprive other people of it. If the acreage is going to be cut down, we insist that the cut should be made upon the basis of the original apportionment; that is to say, upon the basis of 2.66 acre feet measured at the intake to the reservoir and not at the farmer's headgate as indicated by the Court. But if measurement is to be made at the farmers' headgate then the unit of 1.66 acre feet should be used as indicated in the pleadings.

It was the purpose and object of the statute and contract to give to all the settlers the same kind of right, each one sharing in proportion to the acres owned. It was specially stated in the contract,

> "It being understood, however, that priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system" (p. 49).

Yet in the face of this provision of the statute the Court was asked to fix priority between settlers (pp. 27, 40); and the Court has actually started out on such a course by providing that 2.75 acre feet of water must be measured at the points of delivery from the system into the consumer's lateral and by suggesting in the opinion that the area may be reduced by negotiation (p. 306).

What reduction we must make under the opinion and

decree of the Court we do not yet know, further than that it must be very great. If we are to follow the decree of the Court, then we must give to the settlers, so far as possible, 2.75 acre feet of water for their holdings and the remaining part of the settlers must be left out. Such a course would have no legal basis in the statute or the contract. The reduction, if any is to be made, must necessarily be made by a proportionate cut in the holdings of each entryman.

But it is our contention that no cut of any kind is necessary. Taking the available water supply at 130,000 acre feet and the loss in the reservoir system at 15,000 acre feet and in the canal system at another 15,000 acre feet, we would have available for delivery to the farmer at his headgate 100,000 acre feet of water.

The crops on projects in Idaho are divided into two general classes: alfalfa and other crops requiring a similar water supply, and grain and other crops calling for the same amount of water. The acreage on Idaho projects is about equally divided between these two classes of crops. Generally, three crops of alfalfa are raised in southern Idaho. On some of the projects, at this elevation, however, only two crops and a pasture crop are raised. Where three crops of alfalfa are raised four irrigations are found to be sufficient.

Six inches of water applied at each irrigation is a substantial and sufficient quanity, as shown by the Idaho Experiment Stations.

Bulletin 58, Extension Department, State University, p. 11.

Bulletin 78, Extension Department, State University.

Widtsoe Principles of Irrigation Practice, (pp. 23, 277).

Farmers' Bulletin 263, Department of Agriculture, (p. 38).

This calls for the irrigation of four acres per day of twenty-four hours with a head of a second foot of water. A little less than this is commonly irrigated at the first irrigation and a larger acreage at subsequent irrigations, a reasonabl average being four acres.

Four applications of six inches of water would call for two acre feet on one-half of the project. Grain crops are ordinarily irrigated twice. With fall grain, only one irrigation is necessary. Occasionally, it may be best to irrigate lightly three times. The average application of water, however, would not exceed a six inch application in two irrigations or one acre foot of water. The projects being half in alfalfa and crops calling for a similar water supply, and half in grain or other crops requiring a like amount of water, the average requirement for the entire tract would be 1.5 acre feet or on this project, for the application of 86,000 acre feet of water.

But there are other items to be considered in connection with this. On thickly settled projects, eight to ten per cent of the land is not in cultivation (Report of the State Engineer of Idaho, 1913-14 (p. 27), and engineers ordinarily estimate a still greater amount.

And there is still another consideration. Some fifteen to twenty-five per cent of the water applied to an irrigated farm ordinarily runs off its surface and where, as in this case, this drainage is largely utilized again, it is a factor practically increasing the water supply. If it is said that our estimates in this respect are inaccurate, our reply is that they are in actual operation and have been successfully worked out on the Oakley Project, twenty-five or thirty miles to the east, under the same general conditions.

We say that the plan of organization of Carey Act Projects provides that we should occupy the position of a construction company only. That for convenience in attaching the water to the project, we were required by statute to take out a permit covering the project; that the sufficiency of the supply represented by this permit was passed upon in advance by the State Engineer and fully approved by him; that the amount of water that the settler is entitled to is a matter of statutory regulation, to wit, a proportionate interest and not a matter of contract, the proportionate interest being a proportionate interest in the water supply represented by the permit.

We are not "selling water rights" and are paid only for construction work. Under these circumstances, the Court could not render a judgment against us. This is our legal right.

Our legal right brings us no money, however, unless the irrigation project is a practical success. We are in the same position as the settler. We must get our money from the settler and he must get the money out of the land. The project must be organized in such a way as to produce this result, otherwise, whatever legal relief we are entitled to will be of no avail.

We have set up in the pleadings, in addition to the matters heretofore mentioned, further matter to the effect that if the water supply claimed by the settlers is furnished to them, that it will result in injury to the project. It is now a matter of experience that irrigation projects too frequently result in drainage projects. The result on the Twin Falls Project, which immediately adjoins the Salmon River Project on the north (see map, p. 68) shows in a surprising way the necessity for the careful use of water. Mr. Sloan, the expert of the Department of

Agriculture, gives an outline of the work on this project. (Vol. II 63-76).

If the settler presented the matter contained in this bill as a defense to a suit brought to foreclose the lien of the water contract, and if it appeared that we had actually made a contract to deliver him 2.75 acre feet of water per acre and that we could not deliver so great an amount, then taking into consideration that the only right to water is a right to its use in such a quantity as is reasonably required, the rule would be that the settler could only have a deduction from the amount to be paid equivalent to the harm which he has suffered; in other words, if we had contracted to give him 2.75 acre feet of water and were not able to give him so great an amount, still if this quantity was reasonably sufficient for his purposes, then the deduction made would be for nominal damages only. Apparently it was exactly this rule that the settler wished to get away from. He did not wish to have the deduction measured by the injury which he had suffered (pp. 276-7).

In this form of action he seeks a measure of relief and has been given it by the Court which he could not otherwise obtain. The bill did not state grounds for equitable intervention and the relief given is not along equitable lines.

If there is a reduction in acreage it must follow the statute and contract and be made proportionately; any other method would be inequitable, and not to the interest of the settlers.

Refusal to Follow State Decisions.

The case of State v. Twin Falls Canal Co. 21 Ida. 410, and the case following re-affirming it of State v. Twin Falls Canal Co. 26 Ida. 728, practically cover all of the features of the present case, and are reinforced by the

cases of Idaho Irrigation Co. v. Pew, 26 Ida. 272, and the Idaho Irrigation Co. v. Lincoln County, 152 Pac. 1058.

The lower court refused to follow the principles governing Carey Act contracts which are laid down in these cases. These were cases involving the construction of the State statutes and the contracts made under them and should have been followed by the lower court.

In conclusion, we say:

1. We are a construction company only, receiving compensation for work done. We have performed the work and are entitled to our compensation.

2. As required by statute, a water permit was taken out for the entire project in the same way as it is taken out for a single farm. The State determined that this supply was sufficient. This permit determined the amount of water that might be diverted for the entire tract. The portion of this supply that the settler was entitled to was a matter of statutory regulation and not a matter of contract, the statute giving the settler a proportionate part of the entire supply.

3. That taking the terms of the contract as they appear, a settler is entitled to a water right or head of .01 of a second foot of water for each acre of land, this being the proportionate allotment made, to be delivered, however, under a rotation system as the needs of the crops require; that we were to devise this system; that we have the right to do so; that we have the right to deliver the water under a rotation system under reasonable rules and regulations; that there is no promise that the total amount delivered in any season should equal 2.75 acre feet. It need only be such amount as is necessary.

4. That if the individual settlers made defenses to foreclosure suits on the basis of the facts stated in this bill,

that the measure of relief granted would only be to the extent to which the settler was harmed; that the measure of relief sought here and the measure of relief granted by the Court is in excess of this.

5. That under the pleadings the question of the sufficiency of the water supply was one of fact.

6. That the Court refused to follow the rule of the State Court construing State statutes and contracts made under them.

We ask the reversal of the judgment that we may have an opportunity for the benefit of all to put this project on a firm foundation and establish such a reasonable and just use of water as will bring about this result.

Respctfully submitted,

SAMUEL H. HAYS,

Solicitor for Twin Falls-Salmon River Land & Water Company.

APPENDIX.

The Carey Act.

Sec. 4, Act August 1894, 28 Stat. 372:

That to aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation, and sale thereof in small tracts to actual settlers, the Secretary of the Interior, with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State, to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant, and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert-land law.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated, which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan if irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement

and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement.

As fast as any State may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury not otherwise appropriated one thousand dollars.

Amendment of June 11, 1896, 29 Stat. 413, under "Surveying Public Lands:"

That under any law heretofore or hereafter enacted by any State providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an act entitled "An act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: *Provided*, That in no event, in no contingency, and under no circumstances shall the United States be in

any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

Amendment of Mch. 3, 1901, 31 Stat. 1133, Sec. 3, provided the ten-year period of the earlier act should be extended and run from the approval of the plans.

See also Joint Resolution 51, May 25, 1908, 35 Stat. 577, giving an additional grant.

State Statute Relating to Carey Act.

"Sec. 1614. The Register shall have the custody of the records of the board; and shall receive and file all proposals for the construction of irrigation works to reclaim lands selected under the provisions of this chapter; keep for public inspection maps or plats, on a scale of two inches to the mile, of all lands selected; receive entries of settlers on these lands, and hear or receive the final proof of their reclamation; and do any and all work required by the board in carrying out the provisions of this chapter. He shall have authority to administer oaths whenever necessary in the performance of his duties as secretary of the board."

"Sec. 1615. Any person, company of persons, association or incorporated company, constructing, having constructed or desiring to construct, ditches, canals or other irrigation works to reclaim land under the provisions of this chapter, shall file with the board a request for the selection, on behalf of the State, by the board, of the land to be reclaimed, designating said land by legal subdivisions. This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected. The proposal shall be prepared in accordance with the rules of the board and with the regulations of the Department of the Interior; and shall be accompanied by the certificate of the State Engineer that application for permit to appropriate water has been filed in his office, together with the State Engineer's report thereon. It shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached there-

to. In the case of incorporated companies it shall state the name of the company, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid up capital. If the applicant is not an incorporated company, the proposal shall set forth the name or names of the party or parties, and such other facts as will enable the board to determine his or their financial ability to carry out the proposed undertaking."

"Sec. 1616. A certified check for a sum not less than two hundred and fifty dollars, not more than two thousand five hundred dollars, as may be determined by the rules of the board, shall accompany each request and proposal, the same to be held as a guarantee of the execution of the contract with the State, in accordance with its terms, by the party submitting such proposal, in case of the approval of the same and the selection of the land by the board, and to be forfeited to the State in case of failure of said parties to enter into a contract with the State in accordance with the provisions of this chapter."

"Sec. 1617. The person, company of persons, association or incorporated company making application to the board for the selection of lands by the State, shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described in the request to the board. This application for a permit shall be of a form prescribed by the State Engineer and shall be accompanied by two copies of a map of the land to be selected, and it shall show accurately the location and dimensions of the proposed irrigation works. The maps of the lands and proposed irrigation works shall be prepared in accordance with the regulations of the State Engineer's office and the rules of the Department of the Interior."

"Sec. 1618. Immediately upon the receipt of any request and proposal, as designated in Section 1615, it shall be the duty of the Register to examine the same and ascertain if it complies with the rules of the board and the regulations of the Department of the Interior. If it does not, it is to be returned for correction; but, if it does so comply, it shall be submitted to the State Engineer, who shall examine the same and make a written report to the board, stating whether or not the proposed works are feasible; whether the proposed diversion of the public waters

of the State will prove beneficial to the public interest; whether there is sufficient unappropriated water in the source of supply; and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; whether or not the proposed cost of construction is reasonable; and whether or not the maps filed in his office comply with the requirements of said office and the regulations of the Department of the Interior; also whether or not the lands proposed to be irrigated are desert in character and such as may properly be set apart under the provisions of the aforesaid act of Congress and the rules and regulations of the Department of the Interior thereunder. Whenever the State Engineer shall be unable from an examination of the maps and field notes submitted for his examination, to determine whether or not the proposed irrigation works are feasible and adequate, whether or not the proposed cost of construction is reasonable, or whether or not the proposed diversion of the public water would be beneficial to the public interest, and whether or not the lands proposed to be irrigated are of such a character as to come under the provisions of the aforesaid act of Congress, it shall be his duty to make, or cause to be made by some qualified assistant, such survey or examination as will enable him to report intelligently thereon to the board."

"Sec. 1619. On receipt of the report of the State Engineer the Register shall place the request and proposal with the Engineer's report thereon before the board for its consideration. In case of approval the board shall instruct the Register to file in the local land office a request for the withdrawal of the land described in said proposal. No request on which the State Engineer has reported adversely, either as to the water supply, the feasibility of the construction, the cost or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the board."

"Ses. 1620. In case the State Engineer shall report adversely upon the proposed irrigation works, or where requests and proposals are not approved by the board, the said board shall notify the parties making such proposal of such action and the reasons therefor. The parties so notified shall have sixty days in which to submit a satis-

factory proposal; but the board may, at its discretion, extend the time to six months."

"Sec. 1621. Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the board to enter into a contract with the parties submitting the proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers; and the price and terms upon which the State is to dispose of the lands to settlers. This contract shall not be entered into on the part of the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor for irrigation works, which bond shall be in a penal sum equal to five per cent of the estimated cost of the works, and shall be conditioned for the faithful performance of the provisions of the contract with the State."

"Sec. 1622. No contract shall be made by the board which requires a greater time than five years for the construction of the works, and all contracts shall state that the work shall begin within six months from the date of contract; that at least one-tenth of the construction work shall be completed within two years from the date of said contract; that construction shall be prosecuted diligently and continuously to completion, and that a cessation of work under the contract with the State for a period of six months after the second year, without the sanction of the board, will forfeit to the State, all rights under said contract."

Section 1623 relates to forfeiture of the contract on account of the default of the contractor in building the works.

Section 1624 provides that the State shall not be financially responsible for the work.

"Sec. 1625. Immediately upon the withdrawal of any land for the State by the Department of the Interior, and the inauguration of work by the contractor, it shall be the duty of the board, by publication once each week in some newspaper of the county in which said lands are situated, and one newspaper at the State Capital, for a period of four weeks, to give notice that said land, or any part thereof as the board in its discretion may deem is for the best in-

terest of the State, is open for settlement, the price for which said land will be sold to settlers by the State and the contract price at which settlers can purchase water rights or shares in such works."

Section 1626 provides that any citizen of the United States or any person having declared his intention to become such (excepting married women) over the age of twenty-one years, may make land entries not exceeding 160 acres and that

"such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application with the person, company or association who has been authorized by the board to furnish water for the reclamation of said land."

Section 1628 provides:

"Within one year after any person, company or persons, association or incorporated company, authorized to construct irrigation works under the provisions of this chapter, shall have notified the settlers under such works that they are prepared to furnish water under the terms of their contract with the State, the said settler shall cultivate and reclaim not less than one-sixteenth part of the land filed upon, and within two years after the said notice the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from the date of said notice the settler shall appear before the register of the State Board of Land Commissioners, a judge or clerk of any court of record within the State, or commissioners to be designated by the board, within the State, and make final proof of reclamation, settlement and occupation, which proof shall embrace evidence that he is the owner of shares in the works which entitled him to a water right for his entire tract of land sufficient in volume for the complete irrigation and reclamation thereof; that he has been an actual settler thereon and has cultivated and irrigated not less than one-eighth part of said tract."

The remainder of the section relates to fees, etc., and also provides that when the works are completed in accordance with the Act of Congress that the application for patent shall be made.

"Section 1629. Upon the issuance of a patent to any lands by the United States to the State, notice shall be forwarded to the settler upon such land. It shall be the duty of the board, under the signature of the president at-

tested by its Register, to issue a patent to said lands from the State to the settler.

"The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passed from the United States to the State. Any person, company or association, furnishing water for any tract of land shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water rights; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired. The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate."

"Upon default of any of the deferred payments secured by any lien under the provisions of this chapter, the person, company of persons, association or incorporated company, holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right. All sales shall be advertised in a newspaper of general circulation, published in the county where said land and water right is situate, for six consecutive weeks, and shall be sold to the highest bidder at the front door of the court house of the county, or such place as may be agreed upon by the terms of the aforesaid contract. And the sheriff of said county shall in all such cases give all notices of sale, and shall sell all such lands and water rights, and shall make and execute a certificate of sale to the purchaser thereof. At such sale no person, company or persons, association or incorporated company, owning and holding any lien, shall bid in or purchase any land or water right at a greater price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right."

The remainder of the section relates to the time of redemption, certificate of sale, etc.